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In The

# Supreme Court of the United States

MORTIMER OFF SHORE SERVICES, LTD.,

*Petitioner,*

v.

FEDERAL REPUBLIC OF GERMANY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act authorizes federal courts to hear suits based upon the commercial activity of a foreign state in the United States. 28 U.S.C. § 1605(a)(2). The Second Circuit determined that the district court lacked jurisdiction to consider Germany's successor liability on dollar-denominated bonds issued and payable in New York. The court held that a plaintiff must identify a *new* and additional commercial act once sovereign succession has occurred, despite this Court's holding that "a mere change of sovereignty" does not extinguish commercial debt obligations. *Vilas v. City of Manila*, 220 U.S. 345, 353-54 (1911). The court's holding creates an unprecedented nullification of commercial debt obligations that is contrary to well established law and in conflict with a recent decision of the Eleventh Circuit. The questions presented are:

1. Whether the Foreign Sovereign Immunities Act bars successor government or state liability for a predecessor's commercial debt obligations.

2. Whether a plaintiff must show a new and additional commercial activity by a foreign state to establish jurisdiction under the Foreign Sovereign Immunities Act when the foreign state has assumed liability for a debt under the customary international law of state or government succession.

## PARTIES TO THE PROCEEDINGS

Plaintiff-Appellant-Cross-Appellee below was Mortimer Off Shore Services, Ltd.

Defendant-Appellee-Cross-Appellant below was Federal Republic of Germany.

## RULE 29.6 STATEMENT

Mortimer Off Shore Services, Ltd. is a private company. There is no publicly traded company owning 10% or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

Mortimer Off Shore Services, Ltd., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The opinion of the Second Circuit is reported at 615 F.3d 97, and reproduced at Petition Appendix ("Pet. App.") 1-47. The Second Circuit's order denying rehearing is reproduced at Pet. App. 84-85. The opinion of the United States District Court for the Southern District of New York is reproduced at Pet. App. 48-79.

## JURISDICTION

The U.S. Court of Appeals for the Second Circuit entered judgment on July 26, 2010, Pet. App. 1, and denied the timely petition for rehearing on August 20, 2010, Pet. App. 84. On October 18, 2010, Justice Ginsburg granted an extension to and including December 17, 2010, of the time for filing a petition for a writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## TREATIES AND STATUTORY PROVISIONS

Relevant provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., are reproduced at Pet. App. 86-94.

## INTRODUCTION

This petition raises the important, recurring question whether the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq., bars enforcement of debt against a sovereign whose predecessor issued or guaranteed the debt. The Second Circuit's decision misreads the FSIA's plain language and abrogates the international law governing sovereign debt by creating an artificial distinction between predecessors and successors that allows them to escape the consequences of their commercial activity while accepting its benefits. It constitutes an unprecedented nullification of commercial sovereign debt.

This Court's long-standing principle is that "a mere change of sovereignty" does not serve to extinguish public debt obligations. *Vilas v. City of Manila*, 220 U.S. 345, 353-54 (1911). The Court has also upheld jurisdiction against foreign states for claims based on acts by a predecessor that met the statutory requirements for exceptions to immunity under the FSIA. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). By requiring that a state undertake a new and additional commercial act after succession, the Second Circuit imposes *de facto* the discredited

"blank slate" doctrine of state succession to debts, frustrating the federal courts' consistent case law to the contrary and undermining the FSIA's restrictive approach to sovereign immunity. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-04 (1976).

The Second Circuit's decision is contrary to a recent decision of the United States Court of Appeals for the Eleventh Circuit that Germany's "issuance and sale of bonds in the United States" before World War II "brings it within the commercial-activity exception to the FSIA's grant of immunity." *World Holdings, LLC v. Federal Republic of Germany*, 613 F.3d 1310, 1315 (11th Cir. 2010). Under the reasoning of the court below, these same acts would not fall within the FSIA's commercial activity exception. Thus, the Second Circuit's decision not only presents a circuit split with the Eleventh Circuit, but it confuses the circumstances under which foreign sovereigns may be sued in United States courts and predicates foreign states' amenability to suit on the jurisdiction in which they are sued. This split is certain to recur; lawsuits presenting this issue are pending in district courts in the First, Second, Seventh, and Eleventh Circuits.

Finally, the Second Circuit's abolition of automatic state succession to debt obligations has potentially enormous, negative ramifications for U.S. holders of foreign sovereign debt, international financial markets, and developing and emerging states. Changes in government or state organization, as well

as border disputes and territorial movements, will disrupt creditors' ability to enforce commercial obligations under the Second Circuit's decision. This result is counter to the FSIA, which was enacted to ensure that foreign states which engage in commercial activity are treated no differently than other commercial actors and remain responsible for their commercial debts. And this result would injure foreign states themselves by increasing the cost and decreasing the availability of credit. The Court should grant certiorari to address the important statutory issues this case presents.

## STATEMENT OF THE CASE

This suit is one of many that have been brought around the country seeking to require Germany and its financial institutions to honor debt they issued, guaranteed, or made payable in the United States. This action is rooted in bedrock principles of commercial law and seeks to enforce bearer obligations within the relevant limitations period, after the claims were deferred.

1. Mortimer is the good faith purchaser of "German Provincial & Communal Bank Consolidated Agricultural Loan Secured Sinking Fund Gold Bonds Series A 6-1/2% – Due June 1958" ("the Bonds"), which were issued in 1928 by a consortium of German provincial government-owned banks. Pet. App. 5-6. The bonds were denominated in United States dollars,

were listed on the New York Stock Exchange, and were payable in Boston, Chicago, or New York City. This bond issuance was part of the German government and government-owned banks' program of procuring municipal credit financing from investors in the United States. *Id.*

Shortly after the bonds were issued, Germany declared a moratorium on payment and began repurchasing Bonds at a discount, which it either cancelled, transferred, sold, or otherwise disposed of for value. Pet. App. 9. In 1938, Germany entered into a written guarantee of payment on the bonds to support its repatriation program. After World War II, Germany sought to restore its status as a member of the community of nations by honoring its external debt obligations. The Allied Powers obtained a commitment from Germany to pay its pre-World War II external debt as a condition of this reinstatement; German Chancellor Konrad Adenauer expressly confirmed Germany's liability "for the pre-war external debt of the German Reich." Pet. App. 36.

Germany, the United States, and seventeen other creditor countries subsequently entered into the Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, 446 (1953), which is commonly known as the London Debt Accord. It created a strictly voluntary program, implemented by a German "Validation Law," whereby the bonds were validated for eligibility and holders of validated bonds received offers to settle the outstanding obligations on discounted terms. The Law expressly excluded German

external debt arising from debtors located outside the territory of West Germany.

In 1990, Germany reunified with the German Democratic Republic ("East Germany"), returning many of Germany's borders to earlier locations. The Reunification Treaty expressly precluded the Validation Law's application to debtors located in the former East Germany. Pet. App. 69-70.

2. Mortimer brought suit against Germany in the Southern District of New York, one of the enumerated places of payment for the bonds, within the twenty-year statute of limitations for enforcing the bonds. *See* N.Y. C.P.L.R. § 211(a). Germany moved to dismiss the action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), alleging that the Court lacked subject matter jurisdiction over Mortimer's claims under the FSIA and that the complaint failed to state a claim upon which relief could be granted.

The district court granted Germany's motion in part and denied it in part. The court held that the FSIA's "commercial activity" exception provided jurisdiction because Germany acted as a market participant when it guaranteed Mortimer's Bonds through the London Debt Accord. Pet. App. 53-54, 59. The district court dismissed Mortimer's Complaint under Federal Rule of Civil Procedure 12(b)(6) because it ruled that Mortimer failed to meet a heightened pleading burden purportedly occasioned by Germany's status as a foreign sovereign. Pet. App. 72, 78-79. The district court denied Mortimer's motion to

amend the judgment and motion for leave to amend its original complaint. Pet. App. 80-83.

3. Mortimer appealed, and Germany cross-appealed, challenging the district court's jurisdiction under the FSIA. The United States Court of Appeals for the Second Circuit affirmed, in part on other grounds. It found that Germany was not subject to suit under the commercial activity exception regarding obligations that were issued by banks in territory that was controlled by East Germany.

The court stated two reasons for this result. First, "[b]ecause no 'action' within the meaning of § 1605(a)(2) occurs when a successor state accedes to liability, the requirements of FSIA's commercial activity exception are not met in that context and jurisdiction under the FSIA based on such accession will not lie." Pet. App. 31. Thus, the court held that the district court lacked jurisdiction to decide Mortimer's claims because Germany purportedly had not engaged in any new or additional commercial activity with regard to these obligations, despite the fact that the Bonds were enforceable against its predecessor, which had clearly undertaken commercial activity in the United States.

Second, the court of appeals held "that there is no evidence presented that East Germany and the FRG explicitly assumed liability for any East German Agricultural Bonds." Pet. App. 28. In so doing, the court below rejected Mortimer's allegation that Germany had guaranteed payment on the Bonds,

holding that assumption of debt through succession and various other "acts of recognition" were incapable of establishing jurisdiction. Pet. App. 31-38.

The Second Circuit denied Mortimer's petition for rehearing. Pet. App. 84-85.

4. This suit is one of numerous lawsuits pending in the United States courts against Germany and German financial institutions for their default on pre-World War II debts that they issued or guaranteed. These suits are pending in district courts in the First Circuit, *Mortimer Off Shore Servs., Ltd. v. Federal Republic of Germany, et al.*, No. 10-1151 (D. Mass. filed Sept. 10, 2010), the Second Circuit, *Kupfer v. Federal Republic of Germany*, No. 07-Civ-8589 (PAC) (S.D.N.Y. filed Oct. 3, 2007), the Seventh Circuit, *Bleier v. Bundesrepublik Deutscheland*, No. 08-CV-6254 (N.D. Ill. filed Nov. 3, 2008), and the Eleventh Circuit, *World Holdings, LLC v. Federal Republic of Germany*, No. 08-20198 (S.D. Fla. filed Jan. 23, 2008); *Sovereign Bonds Exchange LLC v. Federal Republic of Germany*, No. 10-21896 (S.D. Fla. filed June 9, 2010); *Sovereign Bonds Exchange LLC v. Federal Republic of Germany*, No. 10-21944 (S.D. Fla. filed June 11, 2010); *Sovereign Bonds Exchange LLC v. Federal Republic of Germany*, No. 10-23577 (S.D. Fla. filed Oct. 5, 2010).

In each of these cases, the plaintiffs' attempt to enforce garden-variety debt instruments has been resisted or deferred by Germany's refusal to honor, or to allow its nationals to honor, pre-World War II

debts. In each, the district court will be required to determine the FSIA's applicability to claims brought against Germany. Notably, in a decision issued prior to the Second Circuit's denial of Mortimer's petition for rehearing, the Eleventh Circuit held that pre-World War II Germany's "issuance and sale of bonds in the United States brings it within the commercial-activity exception to the FSIA's grant of immunity." *World Holdings*, 613 F.3d at 1315. The Eleventh Circuit remanded, and that case is now in discovery.

## REASONS FOR GRANTING THE PETITION

The questions presented by this case are recurring and of exceptional importance to the Nation, and warrant review by this Court. The Second Circuit misconstrued the FSIA as an automatic bar on successor state or successor government liability for commercial debts, in contravention of the FSIA's plain language, this Court's precedent, and international law, and in conflict with the Eleventh Circuit. The Second Circuit's abolition of automatic state succession to commercial debt obligations also has potentially enormous, negative ramifications for U.S. investors, international financial markets, and the ability of developing and emerging states to obtain credit. The Court should grant certiorari to decide this important federal question and to resolve the conflict between the decision of the Second Circuit and those of this Court and the Eleventh Circuit.

## I. THE DECISION BELOW CONFLICTS WITH THE FSIA'S PLAIN LANGUAGE, THE DECISIONS OF THIS AND OTHER COURTS, AND INTERNATIONAL LAW

The Court, other federal courts, and international law all recognize the subrogation of successor states and governments to the type of commercial obligations that are at issue in this action. The FSIA's plain language allows federal courts to consider and vindicate these claims, which are based on the foreign state's commercial activity. By misconstruing the FSIA, the decision below would establish a new rule of non-succession to international commercial obligations in contravention of each of these principles.

### A. The FSIA's Plain Language Does Not Immunize A Foreign State From Suit Based On A Predecessor's Commercial Activity

The Second Circuit's holding that the FSIA precludes jurisdiction because "[a]ccession to liability by the rules of customary international law entails no action by the successor state with respect to the commercial activity at issue – the assumption of liability," Pet. App. 30, contravenes the FSIA's plain language.

1. The federal courts have jurisdiction over foreign states for all claims "to which the foreign state is not entitled to immunity under [the FSIA] or under any applicable international agreement." 28

U.S.C. § 1330(a). The Court has long refused to extend sovereign immunity to the commercial dealings of foreign governments, *see Dunhill*, 425 U.S. at 702-03 (1976) (listing cases), and the FSIA manifests Congress's intent that foreign states be treated no differently than any other market participant when they engage in commercial activity, *see* 28 U.S.C. § 1602 ("Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned. . . ."). The FSIA's commercial activity exception therefore authorizes federal courts to decide, *inter alia*, claims that are "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2).

2. "It is self-evident that issuing public debt is a commercial activity within the meaning of Section 1605(a)(2)." *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991); *Republic of Argentina v. Weltover*, 504 U.S. 607, 616 (1992) (holding that Argentina's issuance of bonds "was a 'commercial activity' under the FSIA"). Guaranteeing another party's performance is no less a commercial activity under 28 U.S.C. § 1605(a)(2). *See, e.g., U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 199 F.3d 94, 99 (2d Cir. 1999); *Tonoga, Ltd. v. Ministry of Public Works & Hous.*, 135 F. Supp. 2d 350, 356 (N.D.N.Y. 2001). Sovereign default on bonds that are issued and payable in New York necessarily has a direct effect in the United States. *See Weltover*, 504 U.S. at 619. There can be no question that Germany's predecessor

engaged in commercial activity when the bonds were issued, when it entered into a 1938 guaranty agreement for the bonds, and when its political subdivisions guaranteed the bonds at issuance.

3. "Activity . . . by the foreign state" encompasses the commercial activities of predecessor states. "The term 'foreign state' on its face indicates a body politic that governs a particular territory." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2286 (2010) (citing *Restatement (Second) Foreign Relations Law* § 4 (1965)). The Court's interpretation of foreign states as coextensive with their body politic in the FSIA context reflects long-standing jurisprudence. In *Vilas*, the Court found a continuity between a predecessor government and its successor where "[t]he area and the inhabitants incorporated are substantially the same." *Vilas*, 220 U.S. at 352. Thus, "[t]he juristic identity of the corporation has been in no wise affected, and, in law, the present city is, in every legal sense, the successor of the old." *Id.* at 361. *Accord The Sapphire*, 78 U.S. (11 Wall.) 164, 168 (1870) ("The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being."); *Restatement (Second) of Foreign Relations Law* § 161; *Restatement (Third) of Foreign Relations Law* § 208 cmt. a (1987) ("Under international law, the capacities, rights, and duties set forth . . . appertain to the state, not to the government which represents it.").

"Activity . . . by the foreign state," as used in the FSIA, therefore encompasses predecessor governments and states and the acts of those predecessors. The Court has held that where the FSIA "uses [a term of art], Congress intended it to have its established meaning." *Weltover*, 504 U.S. at 613 (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991)) (alteration in original). As discussed herein, an "activity . . . by the foreign state," especially one of a commercial nature, binds the successor as a matter of international law, and this is particularly so when the successor is the result of a unification.

Application of this canon of construction is particularly appropriate in the FSIA's interpretation because the Act's plain language indicates that Congress was aware of, and was legislating against, this body of international law. *See* 28 U.S.C. § 1602 (expressly recognizing the "international law" principle that "states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned"). Despite the longstanding and widespread application of these legal principles, the Second Circuit failed to acknowledge "that Congress [was] aware of existing law when it passe[d]" the FSIA, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and interpreted the phrase "activity . . . by the foreign state" in contrast to its plain meaning.

4. The Second Circuit's decision stymies the FSIA's statutory purpose, manifest in its text, by shielding successor states from their obligation to honor debt obligations for which similarly-situated

market participants are liable and, in turn, increasing the cost of sovereign borrowing. This result is contrary to the rule "that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *SEC v. Joiner*, 320 U.S. 344, 350-51 (1943) (Jackson, J.).

This Court has explained that the FSIA was intended by Congress to "codif[y], as a matter of federal law, the restrictive theory of sovereign immunity, and transfer[] primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Altmann*, 541 U.S. at 691 (internal quotation marks omitted). To that end, the Court has long recognized the 1952 "Tate Letter" as laying forth the fundamental principles of the restrictive theory. *See, e.g., Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983) (citing Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Philip B. Perlman, Acting Attorney General, 26 Dep't St. Bull. 984 (1952)). The Tate Letter explains that, due to "the widespread and increasing practice on the part of governments of engaging in commercial activities," parties doing business with them should have no less an opportunity "to have their rights determined in the courts" than persons doing business with non-government entities. Tate Letter, 26 Dep't St. Bull. at 984. This is the approach expressly adopted

by the FSIA: a foreign nation's commercial acts are subject to the regular operation of commercial law. *See supra* p. 11.

Yet under the Second Circuit's approach, a successor state is immune from suits premised on uncontested commercial activity of the predecessor for the benefit of the "body politic" governing its territory. *Samantar*, 130 S. Ct. at 2286. The chief effect of the Second Circuit's decision is to deprive foreign states' commercial counterparties of their right "to have their rights determined in the courts" based on succession events, *Dunhill*, 425 U.S. at 714, despite that the predecessor would not enjoy such immunity and that the successor benefits from the commercial activity. Moreover, suits on debt do not implicate comity, *see Weltover*, 504 U.S. at 615-16, which is the fundamental purpose underpinning immunity for sovereign acts. *Verlinden,* 461 U.S. at 486.

In succeeding to its predecessor's debt, a successor state does not act "as regulator of a market, but in the manner of a private player within it." *Weltover*, 504 U.S. at 614. It was Congress's intention, made clear in the FSIA's text, that it be treated as such.[1]

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[1] In addition, the Second Circuit's approach frustrates the FSIA's purpose of "clarifying the rules that judges should apply in resolving sovereign immunity claims" and avoiding complex or political case-by-case determinations. *Altmann*, 541 U.S. at 699. In particular, it implies a regime in which courts look beyond unambiguously commercial activity to consider other types of acts – historical, political, legal and otherwise – that

(Continued on following page)

### B. The Commercial Activity Exception's Plain Language Does Not Exempt Assumption Of Debt Through Succession Of State

The FSIA provides an exception to sovereign immunity where "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and . . . causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Succession entails the assumption of debt by operation of law, and is "an act outside the United States in connection with a commercial activity of the foreign state" that is identical to commercial succession to debts by other market participants.

1. "[W]hen a foreign government acts, not as *regulator of a market*, but *in the manner of a private player* within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Weltover*, 504 U.S. at 614 (emphasis added). "There is . . . nothing distinctive about the state's assumption of debt . . . that would cause it always to be classified as *jure imperii*. . . . " *Id.* at 615. Assumption of debt is an activity routinely undertaken by private parties, no less so than the issuance of debt at issue in *Weltover*. *Mortimer*, Pet. App. 24. As the court below found, "the commercial nature of the act of assuming the West German Bonds 'is confirmed by the fact that

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may bear on the foreign state's ultimate liability. This is at odds with any attempt to streamline the determination of immunity under the restrictive theory. *See Verlinden*, 461 U.S. at 488.

[the Bonds] are in almost all respects garden-variety debt instruments: They may be held by private parties; they are negotiable and may be traded on the international market . . . ; and they promise a future stream of cash income.'" Pet. App. 25 (quoting *Weltover*, 504 U.S. at 615). Nonetheless, the court held that "automatic assumption of liability by a successor state . . . would not meet the requirements of the FSIA's commercial activity exception," because the state engages in no "explicit act." Pet. App. 28.

2. Contrary to this *ipse dixit* reasoning, succession to the commercial obligations of a predecessor is a commercial activity that supports jurisdiction under the FSIA's commercial activity exception. A commercial activity may be, as a whole, a mixture of both "public acts" and "private acts." *See Weltover*, 504 U.S. at 617. In *Weltover*, with respect to Argentina's partial default on its debt, the Court explained that "it is irrelevant why Argentina participated in the bond market in the manner of a private actor; it matters only that it did so." *Id.* Thus, restructuring of sovereign debt, despite having strong "public" aspects and purposes, nonetheless involved the "private," commercial act of issuing debt, which in turn supported jurisdiction under the commercial activity exception. *Id.* at 616-17. For the same reasons, even "a contract to buy army boots or even bullets" – an activity that implicates a nation's paramount sovereign activity, self-defense – "is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Id.* at 614-15.

The Second Circuit ignored the commercial nature of succession to debt by operation of law when it held that in the case of succession, a "state performs no action when it automatically assumes liability." Pet. App. 30-31. Succession to local public debt obligations by operation of law is a "garden-variety" commercial activity in which any private party might engage, for example, by succeeding to debt in the takeover of a corporation. One commercial actor may assume liability for another's bonds. *See, e.g., Prudence Realization Corp. v. Prudence-Bonds Corp.*, 189 F.2d 931 (2d Cir. 1951) (Hand, J.); *Nat'l Bank v. Grand Lodge*, 98 U.S. 123 (1878). Commercial actors may assume debt expressly or impliedly. *See, e.g., Haywin Textile Prods. v. Int'l Fin. Inv. & Commerce Bank*, 38 Fed. Appx. 96, 96-97 (2d Cir. 2002). Successor commercial entities often succeed to the rights and obligations of their predecessors, *see, e.g., Halliburton Co. Benefits Comm. v. Graves*, 463 F.3d 360, 370 (5th Cir. 2006) ("surviving corporation succeeds to both the rights and obligations of the constituent corporation"), and they do so as a matter of law, *see, e.g.*, Del. Code Ann. tit. 8, § 259 (successor corporation of merger liable for "all debts due to any of said constituent corporations on whatever account"). Succession of state is therefore no less a mixture of "public" and "private" acts, and no less "commercial" in nature, than the restructuring of sovereign debt: though the acts may be motivated by a "public," sovereign purpose, the "foreign government acts, not as regulator of a market, but in the

manner of a private player within it." *Weltover*, 504 U.S. at 614.

It is axiomatic that succession is an "activity" and, under the plain meaning of the FSIA, it is necessarily a "commercial activity of the foreign state."

3. Once again, the Second Circuit's ruling to the contrary frustrates the purposes of the FSIA as manifest in its text. Rather than follow the *Weltover* Court's bright-line and easily justiciable rule that "a foreign government [that] acts . . . in the manner of a private player" in the marketplace abrogates its sovereign immunity, the court below would engage in a case-by-case determination of whether a particular act by a foreign state, despite being the necessary product of the predecessors' commercial activity and being itself commercial, is or is not an "explicit act" (a term that it leaves undefined) that then whether it qualifies as a "commercial activity" under another standard. Pet. App. 31. The Second Circuit's approach also suffers the infirmities of treating foreign nations differently than other parties to commercial transactions and denying parties doing business with them an opportunity "to have their rights determined in the courts." *Dunhill*, 425 U.S. at 714. The Second Circuit's interpretation of the FSIA is inconsistent with its text and purpose, and must be rejected.

### C. The Second Circuit's Decision Conflicts With Decisions Of This Court And Gives Rise To A Split Between The Circuits

The Second Circuit's decision that "automatic assumption of liability by a successor state . . . would not meet the requirements of the FSIA's commercial activity exception," Pet. App. 28, would abrogate decisions of this Court and is in conflict with a decision of the Eleventh Circuit.

1. This Court's jurisprudence adopts the international law that sovereign debt passes as a matter of law from a predecessor to its successor. In *Vilas v. City of Manila*, the Court considered claims brought by the creditors of the City of Manila, which argued that its change from that of a Spanish to an American possession allowed it to dishonor debts incurred before the pre-Spanish-American war. The Supreme Court ruled against Manila, stating that "a mere change of sovereignty" does not serve to extinguish public debt obligations. 220 U.S. 345, 353-54 (1911). *See also Sapphire*, 78 U.S. at 168 (holding that the overthrow of the French Emperor Napoleon III and the formation of the Third French Republic did not constitute an end to the French State because it "works no change in the national sovereignty or its rights"). *Cf. United States v. Huckabee*, 83 U.S. (16 Wall.) 414, 434-35 (1872) (successor state's rights and obligations "extend to all the property and rights of the conquered state, including even debts as well as personal and real property").

Courts of appeal and district courts have followed this Court's dictate that successor governments are liable for their predecessors' debts. *See Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 401 (2d Cir. 1927), *cert. den'd*, 275 U.S. 571 (1927) (holding that commercial obligations are unaffected by government successions); *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 731 F. Supp. 619, 623 (S.D.N.Y. 1990) ("The law is clear that the obligations of a state are unaffected by a mere change in government."). *See also United States v. Nat'l City Bank of New York*, 90 F. Supp. 448 (S.D.N.Y. 1950); *Jackson v. People's Republic of China*, 550 F. Supp. 869 (N.D. Ala. 1982). *Cf. United States v. Steinmetz*, 973 F.2d 212, 221-22 (3d Cir. 1992) (holding that United States succeeded to property of Confederacy, and accepting the contention that "the English courts that addressed this issue assumed that when the United States succeeded to the property of the Confederacy, it also succeeded to the debts and obligations attached to that property"). *But cf. 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000) (finding *apportionment* of a debt among successor states of the former Republic of Yugoslavia constituted a political question "reserved to determination by the executive branch" during the pendency of international negotiations on allocation of debt among the successors).

The Second Circuit's decision, which bars successor liability absent a post-succession commercial action, is therefore in tension with, and frustrates the

application of, decisions of this Court and other courts that recognize the automatic succession of debt. This conflict justifies the Court's exercise of its certiorari jurisdiction. *See United States v. Doe*, 465 U.S. 605, 610 (1984) (granting certiorari "to resolve the apparent conflict between the Court of Appeals holding and the reasoning underlying" the Court's holding in another case).

2. Similarly, the Court has held that the FSIA does not bar suit against a foreign state for appropriations of property by its predecessor. In *Altmann*, 541 U.S. 677 (2004), the Supreme Court considered the applicability of 28 U.S.C. § 1605(a)(3)'s exception from immunity in suits where "rights in property are taken in violation of international law" to conduct that occurred prior to the enactment of the FSIA. The suit was brought by the devisee of property that was allegedly taken unlawfully by Austria while it was under German control in 1941. *Altmann*, 541 U.S. at 682-85. The foreign state defendant in *Altmann* was not founded until 1955, and was therefore the successor to the German-annexed (and subsequently Allied-controlled) Austria. *See Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1208-09 (C.D. Cal. 2001). In relevant portions, the exceptions to sovereign immunity at issue in *Altmann* and in the present case are identical: while § 1605(a)(3) speaks of "a commercial activity carried on . . . by the foreign state," § 1605(a)(2) refers to "a commercial activity of the foreign state." Despite that it is a jurisdictional issue, the Court never intimated that the FSIA exception

was not applicable because the taking was made by the defendant's predecessor, rather than the successor state.[2] *Altmann* therefore strongly suggests that FSIA retroactivity reaches across succession events.

3. The Second Circuit's decision also presents a recurring circuit split of national importance. In *World Holdings*, the Eleventh Circuit considered claims brought by the holder of bonds issued by Germany in 1924 and 1930. 613 F.3d at 1312. Like the bonds at issue in this case, these bonds in *World Holdings* were listed on the New York Stock Exchange and were payable in U.S. gold dollars in New York City. *Id.* Germany filed a motion to dismiss for lack of subject matter jurisdiction, alleging that the suit conflicted with a treaty that it believed precluded enforcing the bonds in United States courts. The Eleventh Circuit rejected Germany's jurisdictional argument, holding that the suit was "within the commercial-activity exception to the FSIA's grant of immunity" because it was not disputed that Germany's "issuance and sale of bonds within the United States" in 1924 and 1930 constituted commercial activity. *Id.* at 1315.

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[2] The German provinces that guaranteed the commercial obligations were part of Germany for purposes of the FSIA. *See Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006) (holding that political subdivisions of a foreign state are part of that state for FSIA purposes); *Compagnie Noga D'Importation Et D'Exportation S.A. v. Russian Fed'n*, 361 F.3d 676 (2d Cir. 2004) (same). In addition, the German government expressly guaranteed payment on the bonds in 1938.

By contrast, under the Second Circuit's rule in the present case, the FSIA would have provided Germany with immunity in *World Holdings* because its issuance and sale of the bonds occurred before World War II and "[a]ccession to liability by the rules of customary international law entails no action by the successor state with respect to the commercial activity at issue – the assumption of liability." Pet. App. 30.

The Second Circuit's split with the Eleventh Circuit is not obviated by the fact that Germany did not dispute that its issuance of the bonds constituted commercial activity. The FSIA is jurisdictional. *Altmann*, 541 U.S. at 723. As such, the Court could only base jurisdiction on Germany's consent to suit by finding that it waived sovereign immunity pursuant to the terms of 28 U.S.C. § 1605(a)(1). The Eleventh Circuit expressly refused to do so, however, because there was no dispute between the parties "that the commercial-activity exception *does* apply." 613 F.3d at 1317 & n.12 (emphasis in original). *World Holdings* therefore presents a clear split of authority between the Second and Eleventh Circuits.

Other courts have held that the FSIA does not bar suit against a foreign state for actions taken by its predecessor that satisfy 28 U.S.C. § 1605(a)'s exceptions from immunity from jurisdiction. For instance, in *Agudas Chasidei Chabad of United States v. Russia*, 528 F.3d 934 (D.C. Cir. 2008), the Court exercised jurisdiction over a suit brought by a Jewish religious group against Russia and several

Russian instrumentalities over religious documents allegedly unlawfully taken by Soviet Union in 1917 and 1945. In *Jackson v. People's Republic of China*, 550 F. Supp. 869 (N.D. Ala. 1982), *rev'd on other grounds*, 596 F. Supp. 386 (N.D. Ala. 1984), *aff'd*, 794 F.2d 1490 (1986), *cert. den'd*, 480 U.S. 917 (1987),[3] the district court exercised jurisdiction over a suit to enforce bearer bonds that were issued by China in the United States in 1911 because the issuance by the People's Republic of China's predecessor constituted commercial activity. These decisions are irreconcilable with the decision below, which created an artificial distinction in the FSIA between predecessor and successor states and governments.

4. It is critical that the Court resolve these conflicts at this time. "One of the primary purposes of the certiorari jurisdiction is to bring about uniformity of decisions" on federal law, *see* Eugene Gressman, et al., *Supreme Court Practice* 242 (9th ed. 2007), and issuance of a writ of certiorari is appropriate where "a considerable number of suits are pending in the lower courts which will turn on resolution of these issues, and [there is] a conflict among the circuits. . . ." *See Massachusetts Trs. Of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 237 (1964). Successor liability under the FSIA is a potentially-dispositive issue that is pendent in district courts in the First and Seventh

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[3] The district court's initial decision in *Jackson* is correct; it was reversed by a decision that was itself overruled by *Altmann*.

Circuits, as well in other district courts in the Eleventh Circuit.

The necessity of granting certiorari in this action is magnified by the fact that this split involves the FSIA and the potential liability of foreign sovereigns in the United States courts. "When it enacted the FSIA, Congress expressly acknowledged 'the importance of developing a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n. 11 (1983) (quoting H.R. Rep. No. 94-1487, p. 32). Even beyond the FSIA's goal of uniformity, this Court has often exercised its certiorari jurisdiction to decide "[s]ignificant federal statutory questions implicating federal affairs." *Gressman*, *supra*, at 270.

### D. The Second Circuit's Bar On Successor Liability Frustrates Well-Established Rules Of International Law

Germany is liable for repayment of Mortimer's bonds under well-established principles of international law, but the Second Circuit's decision would shield Germany by interpreting the FSIA as a bar on successor state or government liability.

1. The rule of law automatically subrogating a successor state to predecessor state debt is one of the oldest and most fundamental principles of international law. *See, e.g.*, 2 Samuel Pufendorf, *De Jure Nature et Gentium Libri Octo* bk. 8, ch. 10, § 8, at

1346 (C.H. Oldfather & W.A. Oldfather eds., 1934) (1688); Hugo Grotius, *The Rights of War and Peace* bk. 2, ch. 9, § 8, ¶ 3, at 673 & ch. 9, § 12, at 684 (Knud Haakonssen ed., 2005) (1625). As then-Chief Judge Taft noted in his capacity as an international arbitrator, the rule has been established through state practice, including that which is contemporaneous with the relevant German succession events. *See Tinoco Case* (*Gr. Brit. v. Costa Rica*) (1923), *reprinted in* 18 Am. J. Int'l L. 147, 149-51 (1924). *See also* 1 D.P. O'Connell, *State Succession in Municipal Law and International Law* 416-53 (1967)).[4]

Thus, the *Restatement (Third) of Foreign Relations Law* (1987), describes the long-standing rule of state succession to public debts incurred for agricultural improvements as follows: "[W]here part of the territory of a state becomes territory of another state, local public debt, and the rights and obligations of the predecessor state under contracts relating to that territory, are transferred to the successor state." *Restatement (Third)* § 209(2)(a).[5] Legal commentators

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[4] This rule applies with special force to territorial and local debt of regions incorporated into a successor state, which continue unaffected by the succession event. 1 *O'Connell*, *supra*, at 387.

[5] The Court has applied and relied upon the *Restatement* as authority in many of the most significant Supreme Court cases that necessitated a determination of international law. *See, e.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229, 2252 (2008); *Medellin v. Texas*, 128 S. Ct. 1346, 1357 n.3 (2008); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004); *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993).

concur with the *Restatement*'s conclusion that successor states assume predecessor state local public debt.[6] Germany itself has espoused this view of international law. *See* United Nations Conference on Succession of States in Respect of State Property, Archives and Debts: Vienna, Mar. 1-Apr. 8, 1983: I Official Records: Summary Records of the Plenary Meeting and of the Committee of the Whole 69, U.N. Doc. A/Conf. 117/16 (1995).

This contemporaneous and modern state practice, and confirming commentary, is more than sufficient to establish a binding international legal norm. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort

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[6] *See* Coleman Phillipson, *Termination of War and Treaties of Peace* 323 (1916) ("Whatever reasons may be urged in favour of the assumption of part of the general debt, much stronger reasons may be advanced in favour of the devolution of the local debt, which was incurred solely in the interests of the territory transferred and is inseparable from it."); 1 *O'Connell*, *supra*, at 416 (stating that where "territory is ceded to a successor State, or annexed by it . . . it would be reasonable to expect that the successor State incurs in the change of sovereignty an obligation to either the predecessor State or the creditor."); P.K. Menon, *The Succession of States in Respect of Treaties, State Property, Archives and Debts* 159-60 (1991) (stating that where debts are incurred for the benefit of a territory of the successor state, "the debt has, no doubt to be transferred to the successor state," consistent with the principle "*res transit cum suo onere*"); Tai-Heng Cheng, *State Succession and Commercial Obligations* 282 (2006) (documenting state practice of allocating debts to the successor states whose territory benefited from the debts).

must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators. . . .") (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

2. The Second Circuit, by rejecting this long-standing rule of international law, impermissibly construes the FSIA to violate it. "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). In *Samantar v. Yousef*, 130 S. Ct. 2278, 2290 & n.14 (2010), the Court expressly recognized the *Charming Betsy* canon's applicability where the Court is required to determine whether the FSIA bars immunity in an area the Act unambiguously covers. The Second Circuit's decision runs afoul of this basic canon of construction.

3. The Second Circuit's abrogation of the principles of international law governing state and government succession to local public debt merits this Court's exercise of its certiorari jurisdiction. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964) (granting certiorari to review taking that was found by lower court to be "invalid under international law . . . because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area").

## II. THE APPLICATION OF THE FSIA'S COMMERCIAL ACTIVITY EXCEPTION TO SUCCESSOR STATES AND GOVERNMENTS IS A RECURRING ISSUE OF GREAT NATIONAL IMPORTANCE

State and government succession occur with great regularity on the world stage, and succession events implicate the rights of creditors no less frequently. The Second Circuit's decision, if allowed to stand, threatens the rights of holders of sovereign debts, leaving them susceptible to total loss in the case of a default due to succession, in marked contrast to their ability to sue to assert their rights when default occurs in any other instance. This change in the law implicates debt instruments worth trillions of dollars, including hundreds of billions of emerging- and developing-market debt held in the U.S. by individuals, banks and other financial institutions, and pension funds. It will also impair the ability of sovereigns that are susceptible to succession to obtain affordable credit and, in certain cases, to access credit markets at all. In these ways, the Second Circuit's decision implicates the rights of U.S. investors, the smooth functioning of international financial markets, the stability of financial institutions that have recently faced solvency crises, and the ability of foreign sovereigns to tap credit markets to fund needed development.

### A. Succession and Sovereign Default Are Frequently Recurring Phenomena

This case presents a frequently recurring legal issue – Germany's amenability to suit for pre-war, dollar-denominated debt obligations – as well as implicating broader concerns about the effect of sovereign default following a succession event.

1. The specific question of Germany's liability for pre-World War II debt aimed at the United States is present or pending in district courts in several courts of appeals. *World Holdings*, for example, concerns "Dawes" and "Young" bonds from the 1920s and 1930s on which Germany defaulted in 1934. In relevant respects, *World Holdings* and the present action are indistinguishable: both cases' bonds were issued in the United States, marketed in the United States, payable in the United States, and denominated in U.S. currency. 613 F.3d at 1312. The same is true of *Bleier*, which recently overcame a motion to dismiss for lack of jurisdiction under the FSIA. *Bleier v. Bundersrepublik Deutschland*, No. 08-6254 (N.D. Ill. Oct. 7, 2010) (memorandum opinion and order denying motion to dismiss). And *Mortimer Off Shore Servs., Ltd. v. Federal Republic of Germany, et al.*, No. 10-1151 (D. Mass. filed Sept. 10, 2010), concerns bonds with a present value of $7 billion or more. Due to the large number of bonds that Germany, German *länder*, and other German entities issued in the United States prior to World War II, and due to Germany's decades-long efforts to avoid full liability for its pre-war debts, it is likely that additional such

bonds remain outstanding and will be the subject of future litigation.

2. The issues of this case, however, are not limited in their reach to German debt. State or government succession is a routine occurrence. At any given time, there are numerous changes in state organization or government, as well as border disputes and territorial movements, that implicate creditors' rights. Recent representative examples include the dispute over Kashmir between India and Pakistan, the Bakassi region dispute between Nigeria and Cameroon, the Illemi Triangle dispute between Sudan, Ethiopia, and Kenya, the disputed autonomy of Kosovo from Serbia, the disputed autonomy of South Ossetia from Georgia, the Doi Long region disputed between Burma and Thailand, and the elimination of the Taliban state in Afghanistan, which was arguably a succession of government under international law. Recent instances of state succession that have implicated creditors' rights and affected commercial obligations include the independence of East Timor from Indonesia, the transfer of Hong Kong and Macau to the People's Republic of China, and the dissolution of Czechoslovakia. *See generally* Tai-Heng Cheng, *State Succession and Commercial Obligations* 171-266 (2006). In each instance, successor liability for predecessor debt was a major issue to be resolved following succession. *See, e.g., id.* at 258-61 (discussing the allocation to successor states of the debts of the Czechoslovak Socialist Republic).

3. Sovereign default is also routine. In the past decade, Argentina, the Dominican Republic, Indonesia, Pakistan, and Venezuela have each defaulted on debt held by United States creditors. Standard & Poor's, *Sovereign Rating And Country T&C Assessment Histories*, Nov. 1, 2010. The risk of sovereign default is also on the rise, with sovereign downgrades surpassing 15 percent of 2009, the highest level since the Asian Financial Crisis of 1997. *Id.* In each case of default, creditors were harmed. *See* Federico Sturznegger & Jeromin Zettelmeyer, *Debt Defaults and Lessons from a Decade of Crisis* 23-29 (2007) (surveying economic literature on sovereign defaults and restructurings, and concluding that "a default always harms the creditor.").

### B. The Second Circuit's Decision Barring Jurisdiction To Adjudicate Successor State Liability For Predecessor Debt Will Injure U.S. Investors And Institutions And Foreign Borrowers

1. The Second Circuit's decision puts U.S. investors at great risk of being unable to collect on sovereign debt following a succession event. The market for the debt of nations that may be vulnerable to succession is large and growing. In recent years, investors have shown an "insatiable appetite" for emerging market sovereign debt. Peter Davy, Investors Show 'Insatiable Appetite' For Emerging Market Debt, Dow Jones Newswire, Nov. 29, 2010. Worldwide, total investment in emerging market fixed-income

securities (a category that includes debt and related instruments) amounts to between two and three trillion dollars. Daniel Fisher, Emerging Market Bonds Still A Buy, *Forbes*, Dec. 6, 2010. In the United States, investment in emerging market sovereign debt increased by $39 billion in the first three quarters of 2010, more than four times more than the previous *full-year* record. Davy, *supra*. Market analysts at J.P. Morgan project that the net-inflow figure will hit $70 billion for the full year. *Id*. Over the past decade, U.S. investors' holdings in emerging market bonds have grown seven-fold, and U.S. investment in this type of debt is accelerating, as yields on developing nation debt continue to outpace those available in the developed world. Fisher, *supra*. In addition to U.S. holdings, approximately $500 billion in emerging market debt is denominated in U.S. dollars, and much of it is held by investment funds or traded on U.S. exchanges. *Id*. None of these figures include sovereign debt investment in "frontier" markets, such as the nations of Eastern Europe and Central Asia, which amounts to an additional trillion dollars or more. *See* Global Equity Indexes, MSCI, http://tinyurl.com/2umagrx (listing emerging and frontier markets); Gross External Debt Position by Instrument (2010), World Bank, http://tinyurl.com/278soy5.

By ruling that the FSIA provides a bar on enforcement of sovereign debt instruments following a succession event, the Second Circuit has put at risk billions of dollars of U.S. investments in emerging, developing, and frontier countries. As discussed

above, succession is not a rare occurrence, and the rights of investors in local, regional, and even national debt may be affected by slight shifts in international borders. *See generally* Cheng, *supra*. Following any such event, U.S. investors would be unable to enforce predecessor debt instruments unless the successor state or government chooses to acknowledge the debt and takes some additional act, above and beyond the assumption of debt inherent in succession, that fits the Second Circuit's novel definition of a "commercial activity." *See* Pet. App. 30-31.

Similarly, bars to collecting on sovereign debt will injure pension funds and other fixed-income investors. Pension fund investment in emerging market debt is large and growing, particularly as yields on U.S. government debt have fallen. Emma Boyde, Emerging Market Debt Leads All Bond Fund Classes, *Financial Times*, Oct. 31, 2010. For example, the California Public Employees' Retirement System ("CalPERS"), the nation's largest public pension fund, has adopted a plan of transferring capital from its real-estate portfolio to higher-yielding emerging-market debt. Kit R. Roane, CalPERS and Risk: Together Forever?, *Fortune*, June 30, 2010.

Inability to enforce sovereign debt instruments will also expose U.S. banking and financial institutions to significant default risk. These institutions, many of which have recently been forced to accept government capitalization to avoid insolvency, face significant exposure to debt that is at risk of default following state or government succession. Citigroup,

which is the Nation's third-largest bank and received more than $45 billion from the Troubled Assets Relief Program ("TARP")[7], describes the phenomenon as "country risk," and considers it a serious enough risk to the bank to warrant ongoing review by a "Country Risk Committee" that includes many of the bank's senior officials. Citibank, Annual Report (Form 10-K), at 99 (Feb. 26, 2010). Bank of America, the Nation's largest bank, faces over $50 billion in emerging market exposure, Bank of America Corp., Annual Report (Form 10-K), at 75 (Feb. 26, 2010), of which $28 billion is in sovereign debt, *id.* at 187. Further, Bank of America acknowledges that "the risk of default on sovereign debt in some non-U.S. jurisdictions is increasing and could expose us to losses." *Id.* at 10. JPMorgan Chase, the second-largest bank and another major recipient of government capital, faces total exposure to emerging market debt of $72.4 billion. J.P. Morgan Chase & Co., Annual Report (Form 10-K), at 105 (Feb. 24, 2010). And AIG, the top recipient of government capital faces exposure to a single country's non-investment grade sovereign credit exposure amounting to 1.9 percent of its total equity, and additional sovereign exposure amounting to a quarter of its equity or more. American International Group Inc., Annual Report (Form 10-K), at 175 (Feb. 26, 2010).

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[7] David Cho, U.S. take if it cashes in Citi stake: $8 billion, *Wash. Post*, Mar. 27, 2010.

2. The Second Circuit's effective bar to enforcement of predecessor debt, raised in connection with the acts of a First World country, stands to injure developing and emerging foreign nations by increasing their cost of borrowing and reducing access to debt. Higher risk of default increases the costs of issuing debt. Specifically, "[t]he higher the risk of the debt, the higher the yield or return needs to be in order to make it attractive to investors." Michael Fisher, *Saving and Investing: Financial Knowledge and Literacy* 34 (2005). Debt that is seen as subject to a substantial risk of default obtains lower prices relative to face value and, as risk increases, may have to be burdened with "coupons" to provide earlier, and therefore less risky, compensation to investors. *Id.* at 35. Thus, Venezuela, which has a history of defaulting on debt and unpredictable governance, was recently forced to offer a 15.25 percent coupon on a relatively small issuance of dollar-denominated bonds, Fisher, *supra*, far more than the 6.25 percent coupon rate on bonds issued by Greece, which is in the midst of a debt and budget crisis, Economist Intelligence Unit, Greece/EU Economy, April 1, 2010. In this way, increased default risk can dramatically raise the cost of capital, while requiring substantial payments to creditors throughout the lifetime of the obligation. Further, when the cost of borrowing rises to a point that carrying new debt is not sustainable, sovereign states may be unable to afford to issue new debt or unable to find buyers for it. *See generally* Christine Richmond & Daniel Dias, *Duration of*

*Capital Market Exclusion: An Empirical Investigation* (2009), available at http://ssrn.com/abstract=1027844.

In this way, the Second Circuit's decision will serve to raise the cost of borrowing, or to lock out of credit markets altogether, nations that may be subject to state or government succession and that may be, for that reason, particularly in need of credit to develop infrastructure or replace assets that, due to succession, are beyond reach.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 17, 2010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2008

(Argued: May 13, 2009 Decided: July 26, 2010)

Docket Nos. 08-1783-cv(L), 08-2358-cv(XAP)

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MORTIMER OFF SHORE SERVICES, LTD.,

*Plaintiff-Appellant-Cross-Appellee,*

– v. –

THE FEDERAL REPUBLIC OF GERMANY,

*Defendant-Appellee-Cross-Appellant.*

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Before: WALKER, WESLEY, and WALLACE,* *Circuit Judges.*

Plaintiff-Appellant-Cross-Appellee Mortimer Off Shore Services, Ltd. appeals from the judgment of the United States District Court for the Southern District of New York (Lynch, *Judge*) dismissing Mortimer's action to enforce bearer bonds valued at $400,000,000 against Defendant-Appellee-Cross-Appellant the Federal Republic of Germany ("FRG") for failure to state a claim. Mortimer also appeals from the denial of its subsequent motions to amend the judgment and for

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* The Honorable J. Clifford Wallace, of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

leave to file an amended complaint. The FRG cross-appeals from the denial of its motion to dismiss for lack of subject matter jurisdiction pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*

On appeal, we AFFIRM the district court's dismissal of Mortimer's action for failure to state a claim with regard to the Bonds issued in territory that became West Germany. We agree with the district court that Mortimer cannot seek to enforce the West German Bonds without first complying with the statutory validation procedures aimed to ensure that the Bonds represent valid, legal obligations. We further AFFIRM the motion to dismiss with regard to the Bonds issued in territory that became East Germany, however, we do so on alternative grounds. We grant the FRG's motion to dismiss for lack of subject matter jurisdiction with respect to the East German Bonds because Mortimer failed to allege an "action [by East Germany or the FRG] . . . based upon a commercial activity." 28 U.S.C. § 1605(a)(2), that, if proven, would give rise to jurisdiction over a foreign sovereign. Finally, we AFFIRM the district court's denial of Mortimer's motions to amend the judgment and for leave to file an amended complaint in regard to both the West German Bonds and the East German Bonds.

PEDER A. GARSKE (Mark A. Cymrot & Mark W. DeLaquil, *on the brief*), Baker & Hostetler LLP, Washington, DC, *for Plaintiff-Appellant-Cross-Appellee*.

JEFFREY HARRIS (Max Riederer von Paar & Walter E. Diercks, *on the brief*), Rubin, Winston, Diercks, Harris & Cooke, LLP, Washington, DC, *for Defendant-Appellee-Cross-Appellant*.

TAI-HENG CHENG, Associate Professor of Law & Associate Director, Center for International Law, New York Law School, New York, NY (Roger P. Alford, Professor of Law, Pepperdine University School of Law, Malibu, CA, *of counsel*), *for Amici Curiae Supporting Plaintiff-Appellant-Cross-Appellee*.

JOHN M. WALKER, JR., *Circuit Judge*:

Plaintiff-Appellant-Cross-Appellee Mortimer Off Shore Services, Ltd. ("Mortimer") appeals from the dismissal by the United States District Court for the Southern District of New York (Gerard E. Lynch, *Judge*) of Mortimer's action to enforce 351 bearer bonds ("Bonds") valued at over $400,000,000 (as of the filing of the complaint) against the Federal Republic of Germany ("FRG")[1] for failure to state a claim. *See Mortimer v. The Fed. Republic of Germany*, No. 05 Civ. 10669 (GEL), 2007 WL 2822214 (S.D.N.Y. Sept. 27, 2007). The complaint alleged that the FRG

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[1] The Federal Republic of Germany has existed since 1949, but only included in its territory that of the former German Democratic Republic beginning in 1990, when the two countries unified. Throughout our decision, "FRG" refers to the present-day Federal Republic of Germany, post-unification, "West Germany" refers to the Federal Republic of Germany prior to unification, and "East Germany" refers to the former German Democratic Republic.

assumed liability for the Bonds, which were issued after the First World War by banks located in the state of Prussia in territory later comprising West Germany and East Germany.

We hold that Mortimer's claim seeking to enforce the Bonds issued in territory that became East Germany ("East German Bonds") must be dismissed for lack of subject matter jurisdiction, because Mortimer failed to allege an "action [by East Germany or the FRG] . . . based upon a commercial activity," 28 U.S.C. § 1605(a)(2), that, if proven, would give rise to jurisdiction over a foreign sovereign. We further hold that Mortimer cannot seek to enforce the Bonds issued in territory that became West Germany ("West German Bonds") without first complying with the statutory validation procedures aimed to ensure that the Bonds represent valid, legal obligations.

Next, Mortimer appeals from the denial of its subsequent motions to amend the judgment and for leave to file an amended complaint. We determine that leave to amend would be futile because the proposed amended complaint did not cure the original complaint's deficiencies, either by providing a basis for subject matter jurisdiction to enforce the East German Bonds, or by showing that the validation procedures do not apply to the West German Bonds.

Accordingly, we affirm the district court's dismissal of Mortimer's action in regard to both the West German Bonds and the East German Bonds, and we affirm its denial of Mortimer's motions to amend the

judgment and for leave to file an amended complaint in regard to both the West German Bonds and the East German Bonds.

## BACKGROUND

Mortimer possesses 351 bearer bonds entitled "German Provincial & Communal Bank Consolidated Agricultural Loan Secured Sinking Fund Gold Bonds Series A" ("Agricultural Bonds") that have a face amount of $25,000,000 and that, as of the commencement of this action in December 2005, were estimated to exceed $400,000,000 in value. *Mortimer*, 2007 WL 2822214, at *2. Mortimer brought this action to recover the outstanding principal and interest under the Bonds from the FRG.

On June 1, 1928, a consortium of fourteen provincial banks ("obligor banks") within the state of Prussia, a political subdivision of the German Reich, issued the Bonds and then loaned the proceeds to farmers as part of a Prussian program for improving agricultural conditions. *Id.* at *1. The state of Prussia allegedly guaranteed the obligor banks' obligations under the Bonds. The obligor banks were located within territory later constituting West Germany and East Germany, which have since been reunified to make up the present-day FRG.[2] The Bonds contained

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[2] The FRG asserts on appeal that only nine of the issuer banks are located in its territory, and that the other five are located in present-day Poland and Russia. However, the FRG

(Continued on following page)

coupons from December 1944 and matured on June 1, 1958. The thirty-year Bonds were "listed on the New York Stock Exchange," were marketed in the Southern District of New York, were made "payable . . . in the Borough of Manhattan," New York City, and "entitle[d] the holder to payment upon demand." (Compl. ¶¶ 6, 8, & 13) According to Mortimer, each obligor bank is severally liable for a value of the Bonds proportionate to its share of the underlying loans, and obligor banks located in West Germany and East Germany are liable for 35.5 and 64.5% of the Bonds' debt, respectively. *Mortimer*, 2007 WL 2822214, at *1.

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cites no support for this proposition, which is contradicted by its own representations to the district court. At the February 16, 2007 district court proceedings, Judge Lynch had the following exchange with Mortimer:

> [MORTIMER'S COUNSEL]: Well, it's a question of fact as to where the issuers were actually located and whether the law –
>
> THE COURT: But that's not in dispute. We know who the 14 issuers were; there's no factual dispute about where those banks were located. You can give me a map and point to where the boundaries of the former VRD [sic] and the former democratic republic were, and nobody is fighting about that, we don't need discovery, everybody knows where the banks were.

(Tr. 35:5-12.) At no point during these proceedings did the FRG contend that some of the obligor banks were in Poland, Russia, or anywhere outside of former West German and East German territory.

## I. Historical and Legal Background

### A. German History

The FRG, as it "exists today[,] is the product of a long, contentious, and disparate history." Martin A. Rogoff, *The European Union, Germany, and the Länder: New Patterns of Political Relations in Europe,* 5 Colum. J. Eur. L. 415, 417 (1999). For many centuries, German territory, then part of the *Heiliges römisches Reich* (Holy Roman Empire or "First Reich"), consisted of "several hundred discrete political units." *Id.*

The modern German nation-state was formed in 1871, when most of these units were "united into one [centralized] state under the leadership of [the Kingdom of] Prussia," *id.*, a monarchy, and officially called the *Deutsches Reich* ("German Reich" or "Second Reich"). In 1919, after World War I ended, the King of Prussia abdicated his throne and the *Deutsches Reich* was declared the Weimar Republic.[3] The German Reich was made up of several states or *Länder,* the largest of which was the "Free state of Prussia," Michael Stolleis, *A History of Public Law in Germany, 1914-1945,* 108-09 (Thomas Dunlap trans., Oxford

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[3] Mortimer's complaint alleged that the FRG succeeded to the debts of the "German Reich." (Compl. ¶ 11.) Because Mortimer seeks to enforce bonds issued in 1928, during which German territory was part of the Weimar Republic's *Deutsches Reich,* we interpret Mortimer's references to, and employ the term, "German Reich" to refer to the Weimar Republic.

Univ. Press 2004), that encompassed territory later comprising both West Germany and East Germany.

In 1933, as a result of growing discontentment with the Weimar government, the Nazi Party rose to power and Adolf Hitler was appointed Chancellor of Germany. Over the next few years, the *Drittes Reich* ("Third Reich"), formally abolished the *Länder* parliaments, Rogoff, 5 Colum. J. Eur. L. at 418, and became a centralized totalitarian state. In 1939, under Hitler's dictatorship, the Third Reich invaded Poland, and in 1941, attacked the Soviet Union and declared war on the United States, thereby beginning World War II in Europe. *See generally* William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (1960).

In 1949, four years after World War II ended, the western eleven *Länder* that were controlled by France, the United Kingdom, and the United States merged to form West Germany, a market economy, and the five *Länder* in the eastern sector occupied by the Soviet Union became East Germany, a communist Eastern block state that remained under the Soviet Union's political and military control.

On October 3, 1990, West and East Germany were reunified, thereby creating the present-day FRG.

### B. Foreign Currency Bonds

After the First World War, German enterprises sold a large number of bearer bonds which were

underwritten, marketed, and payable in the United States. *See Abrey v. Reusch,* 153 F. Supp. 337, 339-42 (S.D.N.Y. 1957) (detailing the history of the validation laws and treaties relating to the bearer bonds); *Dix v. Comm'r,* 34 T.C. 837, 838-39 (1960) (same); J.L. Simpson, *The Agreement on German External Debts,* 6 Int'l & Comp. L.Q. 472, 472-86 (1957) (same). Prior to World War II, the issuers repurchased many of these bonds for eventual retirement and submitted them to meet sinking fund and amortization requirements. *Abrey,* 153 F. Supp. at 339. After World War II began, it became "impossible to present such bonds to the American trustees or paying agents for cancellation." *Id.* As a result, German bank vaults held "large numbers" of reacquired, yet uncancelled foreign currency bonds, in negotiable form, that "no longer represented valid obligations." *Id.*

After Germany surrendered in 1945, Russian occupation forces seized and returned to circulation many such bonds with an estimated total face value of $350,000,000, while bona fide purchasers possessed approximately $250,000,000 in valid bearer bonds. *Id.* The invalid, but uncancelled bearer bonds posed a significant problem, both domestically and internationally, as there was a

> real possibility that the eventual holders of the looted bonds would share the available assets . . . of the German obligors equally with the legitimate bondholders, a large number of whom were nationals of the United States. Moreover, the free and open trading

> in the United States of all German Dollar Bonds was impeded by the [resulting] uncertainties. . . .

*Id.* This problem of reacquired, yet uncancelled bonds is integral to the issues on appeal and several legislative acts and treaties that West Germany and the United States subsequently signed.

The parties have asserted that the following laws, agreements, and treaties bear on the question of whether the FRG has assumed liability for the Bonds Mortimer seeks to enforce: (1) the Validation Law[4] and accompanying 1953 Treaty,[5] (2) the London Debt Accord,[6] (3) the 1960 Treaty,[7] and (4) the Unification Treaty.[8] We briefly summarize the relevant portions of each of these documents.

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[4] Gesetz zur Bereinigung von deutschen Schuldverschreibungen, die auf ausländishe Währung lauten (Bereinigungsgesetz für deutsche Auslandsbonds-AuslWBG) [Validation Law for German Foreign Currency Bonds], Aug. 25, 1952, BGBl.I, at 553 (F.R.G.), *translated in* BGBl.II, at 305 (hereinafter Validation Law).

[5] Certain Matters Arising from the Validation of German Dollar Bonds, U.S.-F.R.G., Apr. 1, 1953, 4 U.S.T. 886, T.I.A.S. No. 2794 (entered into force Sept. 16, 1953) (hereinafter 1953 Treaty).

[6] Agreement on German External Debts, U.S.-F.R.G., Feb. 27, 1953, 4 U.S.T. 445 (hereinafter London Debt Accord).

[7] Second Agreement Regarding Certain Matters Arising from the Validation of German Dollar Bonds, U.S.-F.R.G., Aug. 16, 1960, 12 U.S.T. 944 (hereinafter 1960 Treaty).

[8] Vertrag zwischen der Bundesrepublik Deutschland und der Deutchen Demokratischen Republik über die Herstellung der Einheit Deutschlands (Einigungsvertrag) [The Treaty between

(Continued on following page)

1. Validation Law and 1953 Treaty

The 1953 Treaty and Validation Law were part of the overall process of quelling uncertainty about, and facilitating the "orderly settlement of," debts owed by territory that became West Germany after World War II, 1953 Treaty, 4 U.S.T. at 888. Specifically, the 1953 Treaty, to which West Germany, the United States, and various other Western Allied nations were signatories, incorporated by reference the 1952 Validation Law, *see id.*, pursuant to which West Germany allegedly assumed liability for certain specified foreign currency bonds issued before the end of World War II, *see* Validation Law, BGBl.II, at 327, Schedule C.IV, and implemented a series of procedures to determine the validity of such bonds and to screen out invalid ones. The Agricultural Bonds, the category of bonds at issue in this case, are included in the schedule of foreign currency bonds covered by the Validation Law, *see id.* at 327, Schedule C.IV (19), and therefore subject to the Validation Law's procedures, *see id.* at 306, Arts. 1-2.

The Validation Law requires, *inter alia,* that the specified bonds held on January 1, 1945, outside West German borders as they existed in 1937, be registered, submitted along with relevant evidence, and validated after an administrative hearing by a Board

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the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (Unification Treaty)], Aug. 31, 1990, BGBl.II, at 889, *translated in* 30 I.L.M. 457 (hereinafter Unification Treaty).

for the Validation of German Bonds in the United States ("Validation Board") in Germany or the country of offering. *See id.*, at 306, Art. 3; *id.* at 407, Art. 8; *id.* at 310-11, Art. 23.

2. London Debt Accord

Negotiated contemporaneously in 1953, the London Debt Accord – signed by West Germany, the United States and several other nations, but not East Germany – aimed "to remove obstacles to normal economic relations" with other nations and to "facilitat[e] a resumption of payments on [its] external debts." London Debt Accord, 4 U.S.T. at 446. The London Debt Accord represented the culmination of the parties' settlement negotiations respecting West Germany's pre-World War II external debts. *See* Simpson, *Agreement on German External Debts,* 6 Int'l & Comp. L.Q. at 472-74. West Germany agreed, in relevant part, to satisfy its "pecuniary obligations arising out of loan or credit contracts entered into before 8th May, 1945." London Debt Accord, 4 U.S.T. at 448, Art. 4(1)(b). In doing so, it did not repeal the validation requirements, stating that "[o]nly such creditors shall be entitled to benefit under [the Accord], as . . . accept the offer, or, in the case of other debts, assent to the establishment in accordance with such provisions of terms of payment and other conditions in respect of such debts." *Id.* at 453, Art. 15(1).

The parties to the London Debt Accord anticipated the possibility of the reunification of West

Germany and East Germany by agreeing to "review the present Agreement" and to "mak[e] equitable adjustments" respecting East Germany's debts upon reunification. *Id.*, at 459, Art. 25. However, they refrained from delineating what those adjustments would be. As such, despite the discussion of East Germany's debts, the London Debt Accord did not obligate West Germany, after reunification, to compensate holders of bonds issued in what became East Germany after reunification. *See id.*

3. 1960 Treaty

Seven years later, West Germany and the United States executed the 1960 Treaty, which amended the 1953 Treaty by extending the Validation Law to seven categories of bonds issued by utilities and mining corporations in territory that became East Germany. *See* 1960 Treaty, 12 U.S.T. at 944-45. The 1960 Treaty, however, did not extend the Validation Law to the Agricultural Bonds issued in the territory that became East Germany.

4. Unification Treaty

On August 31, 1990, West Germany and East Germany signed the Unification Treaty reuniting the two nations into the present-day FRG. Unification Treaty, BGBl.II, at 889. Subject to certain limitations, West Germany's then-existing laws and legal obligations continued to be valid and were extended to the former East Germany: West German federal law

applied in former East German territory "unless [a given law's] area of applicability [wa]s restricted to [West Germany] and unless otherwise provided in this Treaty, notably Annex I," *id.* at 469-70, Art. 8, as did "international treaties . . . to which [West Germany wa]s a contracting party," *id.* at 471, Art. 11.

Article 11 then provided exceptions for "the treaties named in Annex I." 30 I.L.M. at 471. Annex I, in turn, prohibited "the entry into force of federal law" of "the Securities Validation Act in the revised version published in Part III of the Federal Law Gazette under no. 4139-2, as most recently amended by Article 95(3) of the Law of December 14, 1976 (BGBl.1, p. 3341)." Unification Treaty, App. I Ch. IV.A.I(9), *translation available at* http://www.juris.de (German Ministry of Justice, juris GmbH). Mortimer alleges that this language means that the Validation Law was not extended to cover the East German Bonds.

The Unification Treaty also provided that the FRG "shall take over the sureties, guarantees and warranties assumed by [East Germany] and debited to its state budget prior to unification." Unification Treaty, 30 I.L.M. at 479, Art. 23(6).

## II. Procedural Background

### A. Original Complaint

In December 2005, Mortimer commenced this action, claiming that the FRG "guaranteed, succeeded to, and/or assumed [liability for] the outstanding

and unpaid principal and interest" under the Bonds. (Compl. ¶ 11.)

In June 2006, the FRG filed a motion to dismiss this action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), for lack of subject matter jurisdiction pursuant to the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. § 1602 *et seq.*, and for failure to state a claim, respectively. *See Mortimer*, 2007 WL 2822214, at *2, 6. In response, Mortimer submitted declarations of support from two of its attorneys asserting first, that discovery was necessary to determine the scope and validity of the Validation Law, the validation procedures, and the Reunification Treaty, and second, that after unification, the validation procedures no longer apply.

On September 27, 2007, the district court denied the FRG's motion to dismiss for lack of subject matter jurisdiction. *Mortimer*, 2007 WL 2822214, at *6. Analogizing the FRG's alleged assumption of "garden-variety" bond liability to routine, private commercial transactions, the district court held that the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), applies, thereby conferring subject matter jurisdiction over this case. *Mortimer*, 2007 WL 2822214, at *4-6.[9]

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[9] The district court also found unavailing the FRG's contention that its alleged assumption of liability pursuant to an international treaty was not commercial and only constituted a "political act." *See Mortimer*, 2007 WL 2822214, at *5-6. We consider this argument abandoned, because the FRG did not reassert it on appeal. *See Storey v. Cello Holdings, L.L.C.*, 347

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The district court, however, granted the FRG's motion to dismiss on the basis that Mortimer's complaint failed to state a claim. *Id.* at *11. The district court noted that "unlike private parties, sovereigns can *only* assume liability for debt of predecessor states through explicit acts that leave traces in legal documents." *Id.* at *9 (emphasis in original). With respect to the West German Bonds, the district court determined that "the Validation Law is the only apparent source of [the FRG]'s liability," *id.* at *7, and that Mortimer could not "receive relief on its claim" because it had "not yet complied with the administrative process created by the Validation Law," *id.* at *11. As for the East German Bonds, the district court found that West Germany had not assumed liability under the London Debt Accord, and that, even assuming *arguendo* that West Germany had done so by way of the Validation Law and 1953 Treaty, Mortimer's "failure to comply with [the validation procedures] doom[ed] [its] claim." *Id.* at *10.[10] The district court concluded that Mortimer did not "affirmatively plead the source of [the FRG]'s obligation to satisfy the Bonds," *id.* at *8, and thus failed to "state a claim to relief that is plausible on its face," *id.* at *6

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F.3d 370, 380 n.6 (2d Cir. 2003) (holding that a party abandoned an argument by failing to raise it in its appellate brief).

[10] The district court did not discuss whether East Germany assumed liability for the East German Bonds, although it impliedly rejected such a conclusion by requiring Mortimer to affirmatively plead the source of the FRG's alleged assumption of liability for the Bonds.

(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

### B. Proposed Amended Complaint

On December 12, 2007, Mortimer filed motions pursuant to Federal Rule of Civil Procedure 59(e) to amend the judgment and for leave to file an amended complaint. With respect to the West German Bonds, the proposed amended complaint alleged that the London Debt Accord and 1953 Treaty do not require bondholders seeking to enforce their bonds against the FRG to comply with the validation procedures, and that, in any event, the Validation Law no longer applies after unification. As for the East German Bonds, the proposed amended complaint listed various "acts of recognition" by which Mortimer alleged that the FRG "repeatedly recognized its obligation for the pre-war external debt of the German Reich and the [s]tate of Prussia." (Proposed Am. Compl. ¶ 15.) The proposed amended complaint also averred that the Unification Treaty exempts the East German Bonds from the validation procedures.

On April 9, 2007, the district court denied Mortimer's motion as "essentially an effort to reargue the basic rationale" underlying the dismissal of the claim. *Mortimer*, No. 05 Civ. 10669, Order at 1. The district court reasoned that Mortimer's added allegations that the FRG adopted the obligations of former East Germany by taking over its territory and by entering into the Unification Treaty of 1990 "d[id] not explain

how the former East German state assumed any liability on the [B]onds, or how the provisions of the Validation Law [were] overcome." *Id.* The district court also concluded that "the relation of the present Federal Republic to the pre-war governments of Germany is a classic example of state succession" and not simply a change of government. *Id.* at 2.

Mortimer appealed, challenging both the dismissal of its complaint for failure to state a claim, and the denial of its motions to amend the judgment and for leave to file an amended complaint. The FRG cross-appealed, challenging the district court's holding that it had subject matter jurisdiction over Mortimer's claim under the FSIA.[11]

## DISCUSSION

### I. Subject Matter Jurisdiction Pursuant to the FSIA

The FSIA, which "is the sole source for subject matter jurisdiction over any action against a foreign state," *Cabiri v. Republic of Ghana,* 165 F.3d 193, 196 (2d Cir. 1999), provides that a foreign sovereign "shall be immune from the jurisdiction of the courts of the United States," 28 U.S.C. § 1604, unless one of the FSIA's exceptions applies, 28 U.S.C. §§ 1605-07.

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[11] Tai-Heng Cheng, Associate Professor of Law at New York Law School, and Roger P. Alford, Professor of Law at Pepperdine University School of Law, filed an amici curiae brief in support of Mortimer.

In deciding subject matter jurisdiction pursuant to the FSIA, we review district court factual findings for clear error and legal conclusions *de novo. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 313 F.3d 70, 80 (2d Cir. 2002).

The burden is on the defendant seeking sovereign immunity to show it is a foreign sovereign. *Matar v. Dichter,* 563 F.3d 9, 12 (2d Cir. 2009). If the defendant makes this showing, the burden then shifts to the plaintiff to show that a FSIA-enumerated exception to sovereign immunity applies. *Id.* Under the FSIA, in the context of a Rule 12(b)(1) motion based on factual insufficiency, a court may look beyond the pleadings, to the evidence properly before it, and assess the substance of the allegations "to determine whether one of the exceptions to the FSIA's general exclusion of jurisdiction over foreign sovereigns applies." *Id.* at 140 & n.6 (2d Cir. 2001) (citations omitted). The district court should make this determination recognizing that "a motion to dismiss based on an assertion of sovereign immunity has particular significance because . . . [s]overeign immunity under the FSIA is immunity from suit, not just from liability." *Robinson,* 269 F.3d at 141 (internal quotation omitted).

The question we must answer in this case is whether the commercial activity exception to foreign sovereign immunity provided by section 1605(a)(2) of the FSIA applies. Section 1605(a)(2) states, in relevant part, that a foreign state is not immune where

> the action is based [i] upon a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). Mortimer relies upon the third clause of section 1605(a)(2) to establish jurisdiction; thus, we need consider only "whether this lawsuit is (1) 'based . . . upon an act outside the territory of the United States'; (2) that was taken 'in connection with a commercial activity' of [the foreign state] outside this country; and (3) that 'cause[d] a direct effect in the United States.'" *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (quoting 28 U.S.C. § 1605(a)(2)). The parties agree that the alleged acts at issue took place outside of the United States and caused direct effects in the United States. *Mortimer*, 2007 WL 2822214, at *3. Accordingly, our concern is whether, upon the complaint, an alleged act occurred and, if so, whether it occurred "in connection with a commercial activity of the foreign state." 28 U.S.C. § 1605(a)(2). If either of these did not occur then the foreign state enjoys sovereign immunity under the FSIA and the claim against the state must be dismissed for lack of subject matter jurisdiction.

We begin our analysis by "identifying the particular conduct on which [Mortimer's] action is 'based' for

purposes of the Act." *Saudi Arabia v. Nelson*, 507 U.S. 349, 356-57 (1993) (internal citation omitted). The act is defined by the "elements of a claim that, if proven, would entitle [Mortimer] to relief under [its] theory of the case." *Id.* The alleged conduct that forms the basis of Mortimer's action is the assumption of liability by the FRG, and earlier by West Germany and East Germany, for the Bonds issued by banks in the territory that became West Germany and East Germany.

The next step in our analysis is to determine (a) whether the foreign state (in this case, the FRG, West Germany, or East Germany) actually assumed liability for the Bonds, (b) whether the state committed an action in doing so, and (c) whether the assumption of liability was an action "in connection with a commercial activity" of the state that assumed liability. Mortimer seeks to recover bonds issued by banks in the territory that became both West Germany and East Germany, and we address each in turn.

### A. The West German Bonds

Mortimer's original complaint contended that West Germany, and subsequently the FRG, assumed liability for the Bonds, 35.5% of which were issued in what later became West Germany. It alleged that West Germany obligated itself to honor the terms of these bonds by enacting the Validation Law, *see* Validation Law, BGBl.II at 306, Arts. 1-3; *id.* at 327, Schedule C.IV, and by adopting the 1953 Treaty;

it further alleged that upon reunification the FRG agreed to honor West Germany's laws and treaties, resulting in the FRG's assumption of West Germany's obligation for its share of the Bonds. *See* Unification Treaty, 30 I.L.M. at 471, Art. 11. The FRG disagrees, contending that it did not assume liability for any bonds that were issued in what later became West Germany and that, pursuant to the London Debt Accord, its responsibility in relation to properly validated West German Bonds was only that of a "transfer agent." We need not determine the FRG's obligations respecting properly validated West German Bonds to resolve this appeal because the FRG waived its "transfer agent" argument by failing to present it to the district court. *See Paese v. Hartford Life & Accidents Inc. Co.*, 449 F.3d 435, 446 (2d Cir. 2006) (failure to raise an argument below generally bars appellate consideration of it); *Suez Equity Investors, L.P. v. Toronto-Dominion Bank,* 250 F.3d 87, 104 (2d Cir. 2001).

Before the district court, the FRG neither contended that it was not liable for properly validated West German Bonds, nor contested Mortimer's allegations that the FRG assumed liability for payment of the relevant bond obligations under the Validation Law and the 1953 Treaty. In its motion to dismiss for lack of subject matter jurisdiction, the FRG agreed that it had assumed liability for properly validated West German Bonds but asserted that this assumption of liability was sovereign in character and therefore entitled to immunity pursuant to the FSIA.

Likewise, in its motion to dismiss for failure to state a claim, the FRG did not dispute Mortimer's allegation that the FRG had assumed liability for properly validated West German Bonds. The FRG argued instead that Mortimer had not, and could not, state a claim because Mortimer had failed to comply with the requirements of the Validation Law.

Because the FRG presented no argument to the district court disputing its liability for properly validated West German Bonds, the district court's order simply set forth a then-undisputed proposition: "West Germany assumed liability for certain bonds issued prior to the end of World War II, and by operation of the [1953] Treaty, its liability was extended to bonds offered in the United States." *Mortimer*, 2007 WL 2822214, at *1. The statement was a summary of facts assumed as true by both parties. As a consequence of the FRG's failure to dispute its assumption of liability over properly validated West German Bonds to the district court, it may not raise that argument on appeal.

Starting from the premise that West Germany and the FRG assumed liability for properly validated West German Bonds, we conclude that this affirmative assumption of liability plainly constitutes an action under section 1605(a)(2) of the FSIA. The FSIA defines commercial activity as "a regular course of commercial conduct or a particular commercial transaction or act," rather than by reference to its purpose." 28 U.S.C. § 1603(d). In *Weltover*, the Supreme Court held that Argentina's issuance of "garden-variety"

bonds as an "emergency measure[]" to refinance the country's debt constituted commercial activity for FSIA purposes. 504 U.S. at 609, 615. The Supreme Court clarified that the "nature" and not the "purpose" of a transaction "control[s] in determining commerciality" under section 1605(a)(2). *Id.* at 615. Applying this principle, the *Weltover* Court determined that "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Id.* at 614 (emphasis omitted).

Private parties can and often do assume liability for bonds in trade or commerce. This would occur, for example, when, after issuing bonds, Company A is acquired by and merged into Company B, which then assumes liability for Company A's bonds. By allegedly assuming obligations under the Bonds, the FRG, like Argentina in *Weltover,* engaged in activity routinely undertaken by private parties. There is "nothing distinctive about [the FRG]'s assumption of debt (other than perhaps its purpose) that would cause it . . . to be classified" as non-commercial activity. *Id.* at 615; *see also Jackson v. People's Republic of China,* 550 F. Supp. 869, 873 (D. Ala. 1982) (applying the commercial activity exception to bonds issued by China on the basis that "[i]t is clear that the sale, issuance of sale and authorization of issuance for sale in the United States constitutes a 'commercial activity'"); *cf. In re Terrorist Attacks on Sept. 11, 2001,* 538 F.3d 71, 92 (2d Cir. 2008) (finding no commercial

activity where defendants allegedly made "donations to charity" that were not "part of the trade and commerce engaged in by a merchant in the marketplace" (internal quotation marks omitted)). The commercial nature of the act of assuming the West German Bonds "is confirmed by the fact that [the Bonds] are in almost all respects garden-variety debt instruments: They may be held by private parties; they are negotiable and may be traded on the international market . . . ; and they promise a future stream of cash income." *Weltover*, 504 U.S. at 615.

The FRG does not challenge the conclusion that assumption of liability of the Agricultural Bonds would be an act in connection with a commercial activity under the FSIA; rather, it argues, as it did below, that even if it has assumed liability for properly validated West German Bonds, the commercial activity exception would not apply to Mortimer's West German Bonds because Mortimer failed to satisfy the settlement conditions set forth in the London Debt Agreement by not complying with the validation procedures. We are unpersuaded that non-compliance with the validation procedures undermines the applicability of the commercial activity exception to the FSIA. The issue of whether Mortimer complied with the validation procedures does not touch upon any of the requirements of the commercial activity exception, which is concerned with the conduct of the foreign state and not the allegedly aggrieved party. Mortimer's alleged lack of compliance does not implicate whether the challenged conduct occurred outside of

the United States, was based upon an act in connection with the commercial activity of the foreign state, or caused a direct effect in the United States. 28 U.S.C. § 1605(a)(2). Taking up the validation issue at the jurisdictional stage would thus be premature. *See Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); *Robinson,* 269 F.3d at 141 ("'[J]urisdiction is not defeated by the possibility that the averments might fail to state a cause of action.'" (quoting *Bell v. Hood,* 327 U.S. 678, 682 (1946))).

Finally, even if we were to accept the FRG's contention that it did not assume liability and merely acted as a transfer agent, this court would still have jurisdiction over Mortimer's action pursuant to the FSIA's commercial activity exception. In *Transamerican Steamship Corp. v. Somali Democratic Republic,* 767 F.2d 998, 1002-03 (D.C. Cir. 1985), the only case upon which the FRG relies for its transfer agent theory, the D.C. Circuit rejected a similar argument and found that the Somali embassy "exceeded the bounds of ordinary diplomatic behavior" by "collecting and holding funds and advising a principal as to their receipt." As the D.C. Circuit stated, "[t]he proper inquiry is whether [the state] acted in a sovereign or essentially private capacity." *Id.* at 1002. Because private parties frequently take on similar "transfer agent" obligations, this court would have jurisdiction

even if the court were to accept the FRG's argument that it merely acted as a transfer agent.

Accordingly, we agree with the district court that the FSIA's commercial activity exception applies to the West German Bonds and affirm the district court's denial of the FRG's motion to dismiss Mortimer's claims on the West German Bonds for lack of subject matter jurisdiction.

### B. The East German Bonds

Turning to the East German Bonds, our jurisdictional determination is different. Looking to the allegations in the complaint and the proposed amended complaint, as well as the evidence properly before us, we hold that Mortimer failed to meet its jurisdictional burden with respect to enforcing the East German Bonds against the FRG.

Mortimer seeks to enforce the 64.5% of the Bonds issued by Prussian banks located in territory that became East Germany. Mortimer argues that jurisdiction is appropriate under two theories. Its first theory, predicated on successor state liability, alleges that liability exists on the basis of the FRG's formal takeover of "the territory covering the East German provincial and communal debt . . . represented by the Bonds." (Proposed Am. Compl. ¶ 15.) Its second theory, predicated on affirmative assumption of liability, alleges that the FRG "entered into an agreement . . . in which it assumed liability for the pre-war external debt of the German Reich," and "acknowledg[ed] and

confirm[ed] [its] payment obligations under the Bonds" (Compl. ¶¶ 11, 20); however, the complaint neither specified nor provided copies of treaties or other legislative documents as sources of that alleged liability. In contrast, Mortimer's proposed amended complaint identified various "acts of recognition" by which the FRG allegedly "recognized its obligation for the pre-war external debt of the German Reich[,] the [s]tate of Prussia," and East Germany, but it proffered no evidence of an explicit assumption of liability. (Proposed Am. Compl. ¶ 15.)

We hold that automatic assumption of liability by a successor state, even if established, would not meet the requirements of the FSIA's commercial activity exception. We further find that there is no evidence presented that East Germany and the FRG explicitly assumed liability for any East German Agricultural Bonds, unlike West Germany, which affirmatively and unequivocally assumed liability for valid West German Agricultural Bonds by enacting the Validation Law and subsequent treaties, *see, e.g.,* Validation Law, BGBl.II, at 327, Schedule C.IV(19). Accordingly, we find that subject matter jurisdiction is lacking over Mortimer's cause of action against East Germany.

1. Successor State Assumption of Liability

State succession occurs when one State is replaced by another in its "responsibility for the international relations of territory." Paul Williams & Jennifer Harris, *State Succession to Debts and Assets:*

*The Modern Law and Policy*, 42 Harv. Int'l L.J. 355, 362 & n.21 (2001) (internal quotation marks and citations omitted). The Third Restatement of Foreign Relations Law provides that "where part of the territory of a state becomes territory of another state, local public debt [is] transferred to the successor state; [and] where a state is absorbed by another state, the public debt . . . pass[es] to the absorbing state." Restatement (Third) of Foreign Relations Law § 209(2)(a)-(b) (1987).

Mortimer alleges that East Germany and the FRG automatically acceded to liability for the East German Bonds as successor states of Prussia and that this assumption of liability constitutes an "action . . . based upon a commercial activity" 28 U.S.C. § 1605(a)(2). While we have our misgivings as to whether successor state liability is even applicable in this case,[12] we need not reach that question. Even

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[12] *See 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152, 161 (2d Cir. 2000) (stating that "[t]here is no [absolute] rule of law that automatically subrogates successor states to their predecessor's debt"); Restatement (Third) of Foreign Relations Law, at IX (stating that the Restatement is "in no sense an official document of the United States," because "a number of particulars . . . in [it] are at variance with positions that have been taken by the United States Government." (internal quotation marks omitted)). Successor state liability for the debts of the predecessor state is a far from settled issue of law. *See* Tai-Heng Cheng, *Renegotiating the Odious Debt Doctrine*, 70 Law & Contemp. Probs., Summer 2007, at 7, 11 (stating that "[t]here are no clear customary rules or multilateral treaties in force governing whether and when a successor state is responsible for the debts of its

(Continued on following page)

if we were to find successor state liability, Mortimer's cause of action would nevertheless not lie because it would fail to allege an "action . . . based upon a commercial activity." § 1605(a)(2). Accession to liability by the rules of customary international law entails no action by the successor state with respect to the commercial activity at issue – the assumption of liability. The state performs no action when it

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predecessor state" and that "[j]urists are divided on what the applicable rules might be," despite urging this court in his *amici curiae* brief to find in favor of Mortimer); *see generally* Williams & Harris, supra; Jeff A. King, *Odious Debt: The Terms of the Debate,* 32 N.C. J. Int'l L. & Com. Reg. 605, 609 & n.9 (2007) (providing numerous, conflicting sources). In *767 Third Avenue,* we underscored the policy and institutional dangers of finding successor state liability, namely, that "[s]uch an outcome would directly 'interfere with executive foreign policy prerogatives.'" 218 F.3d at 160 (quoting *Can v. United States,* 14 F.3d 160, 163 (2d Cir. 1994)).

For example, reinforcing our concerns regarding interference with executive foreign policy prerogatives, the FRG has disavowed any liability for the East German Bonds throughout this litigation, and the FRG's Federal Court of Justice, its highest court for civil and criminal matters, recently denied the claim of a United States holder of German dollar bonds issued in 1925 in a city located in what later became East Germany, concluding that neither East Germany nor the FRG succeeded to such debt automatically, under international law, or by way of an affirmative legislative act and treaty. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 25, 2005, 25 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 353/04 (F.R.G.); *cf.* James V. Feinerman, *Odious Debt, Old and New: The Legal Intellectual History of an Idea,* 70 Law & Contemp. Probs., Fall 2007, at 193, 197 n.17 ("Successor regimes that have renounced the debts of their predecessors include . . . East Germany.").

automatically assumes liability. This stands in sharp contrast to a country's assumption of liability through an explicit act, such as West Germany did here. *E.g., Weltover,* 504 U.S. at 609, 615 (holding that Argentina's issuance of bonds was an action that satisfied the FSIA's commercial activity exception). Because no "action" within the meaning of § 1605(a)(2) occurs when a successor state accedes to liability, the requirements of FSIA's commercial activity exception are not met in that context and jurisdiction under the FSIA based on such an accession will not lie.

2. Affirmative Assumption of Liability

Mortimer also alleges that the FRG acceded to obligations under the East German Bonds through various legislative documents and treaties referenced in the original and proposed amended complaints as "acts of recognition." If these documents were sufficient to establish that the FRG became obligated under the East German Bonds, then FSIA jurisdiction would be present; however, they are insufficient, and jurisdiction is absent here as well.

The complaint alleged that "[a]fter World War II, Germany entered into an agreement with the Allied High Commission in which it assumed liability for the pre-war external debt of the German Reich." (Compl. ¶ 11.) However, the complaint provided no further specifics respecting this "agreement." Thus, we understand the complaint's reference to "an agreement with the Allied High Commission" to refer to

the London Debt Accord, which is the only possible, reasonable interpretation of Mortimer's complaint.[13]

In addition, Mortimer's proposed amended complaint specified "acts of recognition" by which the FRG allegedly "repeatedly recognized its obligation for the pre-war external debt of the German Reich and the [s]tate of Prussia": (1) the Unification Treaty, 3 I.L.M. at 379, Art. 23(6); (2) a letter dated March 6, 1951 from Konrad Adenauer, Chancellor, Federal Republic of Germany, to André François-Poncet, Chairman, Allied High Commission (Mar. 6, 1951), *reprinted in* 2 U.S.T. 1250, 1250, *translated in* 2 U.S.T. 1252, 1252 (hereinafter Adenauer Letter); and (3) a post-reunification Letter on Behalf of the Federal Republic of Germany to Office of the Chief Counsel,

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[13] The district court similarly interpreted the complaint as "vaguely allud[ing] to . . . the London Debt Accord," *see Mortimer*, 2007 WL 2822214, at *10, and Mortimer has not contended on appeal that the complaint referred to a different agreement. Nor could we interpret Mortimer's complaint as referring to the Validation Law, the 1953 Treaty, or the 1960 Treaty. With respect to the Validation Law and 1953 Treaty, neither document expressly provided for foreign currency bonds issued in the territory of East Germany and East Germany was not a signatory to the treaty. *See* 1953 Treaty, 4 U.S.T. at 887-91; Validation Law, BGBl.II at 305-27. As for the 1960 Treaty, although it extended the 1953 Treaty to some East German bonds, it did not do so for the Agricultural Bonds, and thus the East German Bonds at issue here. *See* 1960 Treaty, 12 U.S.T. at 944-45.

Securities and Exchange Commission (Feb. 18, 1994) (hereinafter SEC Filing).[14]

We examine each of these documents in turn to determine whether any of them constitutes an act conferring liability for the East German Bonds upon the FRG.

a. London Debt Accord

The FRG's Federal Court of Justice concluded in 2005 that the London Debt Accord does not govern foreign currency bonds issued in territory that became East Germany, and that applying the Accord to such bonds would exceed the appropriate boundaries of judicial decision-making. *See* Bundesgerichtshof, 25 BGHZ 353/04, at 19 ¶ 41. We agree.

Only two provisions of the London Debt Accord, adopted in 1960 by West Germany, address West Germany's liability for the debts of either the German Reich or East Germany. Neither obligates West Germany to assume liability for the East German Bonds.

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[14] The fourth "act of recognition" Mortimer identified is [the FRG]'s formal takeover of "the territory covering the East German provincial and communal debt . . . represented by the Bonds." (Proposed Am. Compl. ¶ 15.) This argument is predicated upon a theory of successor state liability. Because we do not find such a theory cognizable under the FSIA's commercial activity exception, *see supra*, we reject this fourth "act of recognition."

The first, Article 20, governs "Reich [d]ebts" and provides that West Germany will, "at the request of the interested creditors, enter into direct negotiations with regard to these debts." London Debt Accord, 4 U.S.T. at 457. This provision plainly applies only to debts of the German Reich "owing under [m]ultilateral [a]greements," meaning debts for which either the German Reich or West Germany had already assumed liability. *Id.* Even assuming *arguendo* that the East German Bonds constitute "Reich [d]ebts" for purposes of the London Debt Accord,[15] as Mortimer has maintained throughout this action, the Validation Law and 1953 Treaty, cover only foreign currency bonds issued in what later became West German territory. (*See* Tr. 30:16-19 (Mortimer's counsel stated that "the validation law. . . . made every effort not to cover East Germany liabilities [sic] at the time. That's confirmed."); Tr. 36:18-21 (arguing that the 1953 Treaty references and is governed by the Validation Law). Thus, Article 20 does not indicate that the Accord confers East German Bond liability upon West Germany.

The second provision, Article 25, specifically refers to bonds issued in territory that became East Germany, providing that "the Parties . . . will review the [Accord] on the reunification of Germany" to "mak[e] the [Accord's] provisions . . . applicable to the

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[15] This requires significant speculation given that Mortimer alleges only that the State of Prussia, one of the German Reich's *Länder*, guaranteed twelve of the fourteen obligor banks. JA. 39.

debts of persons residing in" East Germany. 4 U.S.T. at 459. Although anticipating West and East Germany's reunification and the need to "mak[e] equitable adjustments," respecting debts incurred in the territory of East Germany, *id.*, Article 25 and the remainder of the Accord refrained from delineating those possible adjustments, let alone imposing liability upon West Germany for any of East Germany's debts. Thus, we conclude that the London Debt Accord did not obligate the FRG to compensate holders of bonds issued in what became East Germany.

b. Unification Treaty

Mortimer's proposed amended complaint also alleged that upon unification, the FRG assumed liability for East Germany's debts, including the East German Bonds. Article 23 of the Unification Treaty provides that the FRG "shall take over the sureties, guarantees and warranties assumed by [East Germany] and debited to its state budget prior to unification." Unification Treaty, 30 I.L.M. at 479, Art. 23(6). Article 23 is "based on the recognition that [the FRG] is liable for [East Germany's] state debts." Frowein, 86 Am. J. Int'l L. at 157. But, Mortimer's argument suffers from a critical flaw: the failure to allege how East Germany assumed liability for bonds issued by private banks located in the state of Prussia. As we concluded in our discussion of automatic successor liability, *supra*, Mortimer has failed to allege an affirmative act by which East Germany assumed liability for debt issued within the German Reich, let

alone the state of Prussia. Thus, Mortimer's allegation that the Unification Treaty alone provides no basis for liability beyond speculation that East Germany assumed liability for the bonds. A claim based on such speculation is implausible. *See Iqbal,* 129 S. Ct. at 1949.

c. Adenauer Letter and the FRG's SEC Filing

The remaining documents referenced in Mortimer's amended complaint are West German Chancellor Konrad Adenauer's letter to the Allied Commission in 1951 opining that West Germany is "liable for the pre-war external debt of the German Reich," 2 U.S.T. at 1252, and, the FRG's SEC filing in 1994 stating that the FRG "is not only the successor to, but is identical with, the German Reich under principles of international public law," and that "holders of the interest coupons or talons . . . can look only to the Federal Republic for payment," SEC Filing at 3.

Neither document provides an independent legal basis for holding the FRG liable for the East German Bonds. Mortimer has identified, and we have located, no precedent holding a foreign sovereign state liable based solely on a representation by its head of state or an administrative filing made in the United States on the sovereign's behalf. Moreover, neither document expressly mentions the East German Bonds at issue; instead, each discusses West Germany's affirmative

assumption of liability for the German Reich's pre-war external debts issued in what became West Germany. It is at best ambiguous whether such statements were intended to cover the East German Bonds, thereby expanding the FRG's legal obligations, as opposed to discussing then-existing debts and obligations undertaken by West Germany in pre-existing multilateral agreements such as the 1960 Treaty.

Chancellor Adenauer's 1951 letter speaks only to West Germany's assumption of the German Reich's debt; it gives no indication that West Germany assumed more than the debt incurred in what became its territory or otherwise obligated itself to honor debt incurred in what became East Germany. Instead, the letter discusses West Germany's debts by reference to its obligation to "resume payments on the German external debt." 2 U.S.T. at 1253. Moreover, Mortimer has never explained how West Germany might have assumed liability for the East German Bonds or would have had any motivation to do so prior to the 1951 letter, such as by way of a preexisting multilateral agreement.

The SEC filing cited by Mortimer provides that the FRG is liable for "*certain* bonds issued between 1924 and 1930 by the German Reich and the [s]tate of Prussia," and subsequently references "interest payments" that the present-day FRG "*obligated itself* to pay . . . following the reunification of Germany" under the London Debt Accord. SEC Filing at 1 (emphases added). As already explained, because the London Debt Accord does not cover foreign currency

bonds issued in the territory of East Germany, the SEC filing logically refers only to bonds issued in what became West German territory, bonds for which West Germany and thus the FRG repeatedly and affirmatively assumed liability, beginning with the Validation Law and 1953 Treaty. Accordingly, we conclude that neither letter expands the FRG's liability to encompass obligations for the East German Bonds. After considering and rejecting all the documents identified by Mortimer's proposed amended complaint as potential bases for holding the present-day FRG liable for the East German Bonds as incapable of advancing Mortimer's claim for compensation, we are left with "mere conclusory statements," *Iqbal,* 129 S. Ct. at 1949, in Mortimer's original complaint. These contentions fail to show anything "more than a sheer possibility," *id.,* that the FRG assumed liability under the East German Bonds. We thus agree with the district court that leave to amend would be futile because Mortimer's proposed amended complaint did not cure the original complaint's deficiencies. *See Acito,* 47 F.3d at 55.

For the foregoing reasons, we affirm the judgment of the district court dismissing Mortimer's claim to enforce the East German Bonds, but we do so on the alternative ground that Mortimer has failed to make the threshold showing necessary to invoke the commercial activity exception to the FSIA, and therefore subject matter jurisdiction is lacking. Insofar as Mortimer has moved for leave to amend the judgment and to amend the complaint with respect to the East

German Bonds, we affirm the district court's denial of that motion.

## II. Mortimer's Claim to Recover on the West German Bonds

Having found subject matter jurisdiction present with regard to the West German Bonds, we now consider Mortimer's claim as to those Bonds on the merits. We review the district court's order granting the FRG's motion to dismiss under Rule 12(b)(6) *de novo,* "consider[ing] the legal sufficiency of [Mortimer's] complaint, taking its factual allegations to be true[,] and drawing all reasonable inferences in [Mortimer]'s favor." *Harris v. Mills,* 572 F.3d 66, 71 (2d Cir. 2009). To survive a motion to dismiss, a complaint must meet a "plausibility standard." *Id.* at 72. Although we "'must accept as true all of [a complaint's] allegations . . . ,' that 'tenet' 'is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Id.* (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)) (second alteration in *Harris*). This analysis is "'a context-specific task that requires [us] to draw on [our] judicial experience and common sense.'" *Id.* (quoting *Iqbal,* 129 S. Ct. at 1950).

As for the district court's denial of Mortimer's subsequent motions to alter the judgment and for leave to amend its complaint, although we generally review such determinations for abuse of discretion,

where the determination is based upon a legal interpretation, *de novo* review is appropriate. *See Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 592 (2d Cir. 2007); Fed. R. Civ. P. 44.1. It is well-established that "[o]ne good reason to deny leave to amend is when such leave would be futile," specifically when "the additional information d[oes] not cure the complaint." *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 55 (2d Cir. 1995).

As previously noted, Mortimer's original complaint alleged that the FRG assumed liability for the Bonds, 35.5% of which were issued in what later became West Germany. Mortimer's proposed amended complaint further alleged that "[t]he German Validation laws are no longer in force and do not currently apply to the obligations of West German origin." (Proposed Am. Compl. ¶ 22.) Because Mortimer has failed to plausibly allege that it either met the statutory validation requirements aimed to represent valid, legal obligation or was not required to do so, we conclude that it has failed to state a claim.

Starting from the premise that the FRG assumed liability for valid foreign currency bonds issued in the territory that became West Germany – which we accept for reasons already stated, the parties dispute whether Mortimer must comply with the validation procedures before seeking to recover on the West German Bonds in its possession. The FRG argues that no cause of action in this case lies because Mortimer failed to comply with the validation procedures. Mortimer does not assert that it complied with the

validation procedures; instead, it contends that it need not do so. Specifically, Mortimer avers that "the Validation Law is no longer in effect," and that even if it is, Mortimer's claims are enforceable notwithstanding its refusal to register and submit the West German Bonds to a Validation Board. We address each argument in turn.

### A. Continued Applicability of Validation Procedures

We first examine whether the bond validation procedures required by the Validation Law are still in force. Mortimer argues that the Unification Treaty's inclusion of the Validation Law in Annex I amounts to an implied agreement that the Validation Law is no longer in effect. This argument is without merit. Article 11 of the Unification Treaty provides that "international agreements to which [West Germany] is a party shall retain their validity, and with the exception of the treaties named in Annex I, shall also relate to [former East German] territory." 30 I.L.M. at 471. Article 11's plain language only excludes treaties listed in Annex I from being extended to former East German territory; it in no way affects the validity of those treaties with respect to former West German territory. *Cf. Reese Bros., Inc. v. United States,* 447 F.3d 229, 235 (3d Cir. 2006) ("The usual meaning of the word 'and' . . . is conjunctive, . . . unless the context dictates otherwise, the 'and' is presumed to be used in its ordinary sense." (internal quotation marks omitted)). Moreover, the Validation Law is

listed in the FRG's current statutory code, with only minor amendments irrelevant to this case since its enactment.[16]

The Validation Law's continued applicability is supported by the inclusion of both the 1953 and 1960 Treaties, which incorporate the Validation Law, in the United States Department of State's list of "treaties in force" as of January 1, 2009, *see* United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2009,* at 100-01 (2009), *available at* http://www.state.gov/documents/organization/123747.pdf (last visited January 29, 2010). Both the 1953 and 1960 Treaties confirm that

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[16] These amendments, the most recent of which was in December 2008, replaced the names of ministries and agencies or the titles of laws referred to in the Act when these name changes occurred. *See* Bereinigungsgesetz für deutsche Auslandsbonds in der im Bundesgesetzblatt Teil III, Gliederungsnummer 4139-2, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 82 des Gesetzes vom 17. Dezember 2008 (BGBl. I S. 2586) geändert worden ist [Securities Validation Act in the revised version published in Part III of the Federal Law Gazette under no. 4139-2, as most recently amended by Article 82 of the Law of December 17, 2008 (BGBl. I S. 2586)], BGBl.III, at 4139-2 (F.R.G.) (providing most recent version of the Validation Law and noting its 2008 amendment); Introductory Act of the Fiscal Code, Gesetz, Dec. 13, 1976, BGBl.I at 3341, art. 94, no. 3 (amending the Act by replacing the word *Reichsabgabenordnung* (Imperial Fiscal Code) with the term *Abgabenordnung* (Fiscal Code) when West Germany enacted a new Fiscal Code); *Bundesgesetzblatt Teil I Fundstellennachweis A* 4139-2 (Dec. 31, 2008) (listing amendments in 2001, 2003, and 2008 that made similar name changes).

the Validation Law may not be amended or modified "except as may be agreed between [West Germany] and the United States." 1960 Treaty, 12 U.S.T. at 944; 1953 Treaty, 4 U.S.T. at 888-89, Art. I. Therefore, inclusion on the "treaties in force" list suggests the conclusion that there has been no agreement between the United States and the FRG to nullify the Validation Law.

For the foregoing reasons, we conclude that the Validation Law's bond validation procedures continue to apply to the West German Bonds.

### B. Enforceability of Mortimer's West German Bonds

We now turn to the plausibility of Mortimer's attempt to enforce its West German Bonds as a "non-assenter"[17] – that is, a bondholder who neither registered nor presented its foreign currency bonds for validation in accordance with the Validation Law. Mortimer contends that the Validation Law's sole restriction on such a claim for compensation is that it "may not be asserted to the prejudice of holders of validated foreign currency bonds," Validation Law, BGBl.II at 317, Art. 52(1), and that because the FRG

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[17] We use the term "non-assenter" because the London Debt Accord only deems bonds enforceable if the bondholder "assent[s] to the . . . conditions in respect of such debts," 4 U.S.T. at 453, Art. 15(1), which refers in the case of West German bonds to compliance with the Validation Law's procedures.

made final payments to settling creditors in 1994, there is no possibility that validated bondholders would be prejudiced by a non-assenter's claim.

We find Mortimer's position unavailing. First, Mortimer points to no language in any enactment that abrogates the validation requirements once all validated bondholders have been compensated. In light of the express validation requirements in the Validation Law, 1953 Treaty, and London Debt Accord, *see id.* at 306, Art. 2 ("Foreign currency bonds remain valid only if they are validated . . . pursuant to this Law."); *id.* at 315, Art. 41 (placing the burden of proving the bonds' validity on the bondholder) *id.* at 317, Art. 50 (governing the "Invalidation of Bonds which have not been validated"); 1953 Treaty, 4 U.S.T. at 889, Art. II (providing that "[n]o bond . . . shall be enforceable unless and until it shall be validated" in accordance with the Validation Law); *id.* at 888 (providing that corresponding "benefits" "apply only to bonds which have been duly validated"); London Debt Accord, 4 U.S.T. at 453, Art. 15(1) (extending "benefit[s]" to a limited class of creditors who "assent to the . . . conditions in respect of such debts"), we find Mortimer's non-assenter claim unpersuasive.

Additionally, we find Mortimer's argument regarding the intent of the validation procedures to be unreasonably narrow. While the validation procedures were created, in part, to facilitate assenting bondholders' receipt of payment, there is no reason to believe that prejudice to validated bondholders is the

only reason to require validation. There is another significant reason to screen out and protect against illegitimate bond claims. As the 1953 Treaty explains, the Validation Law facilitates the settlement of West Germany's financial "obligations . . . with assurance that claims prejudicial to such settlement will not be asserted on the basis of bonds which were unlawfully acquired." 1953 Treaty, 4 U.S.T. at 888. *See generally Abrey,* 153 F. Supp. at 339-42 (detailing the historical background leading to promulgation of validation procedures).

In any event, even assuming *arguendo* that enforcing Mortimer's claims would not prejudice holders of validated bonds, Mortimer failed to comply with the additional requirements that all non-assenting bondholders must meet. In addition to the requirement, cited by Mortimer, that a claim for compensation based on non-validated bonds not "prejudice of holders of validated [bonds]," Article 52(1) also requires that a claimant establish two preconditions prior to asserting such a claim: (1) that the bonds at issue were "validated upon timely registration"; and (2) that "the failure to register [the bonds] was not due to . . . gross negligence." BGBl.II, at 317. Moreover, the next paragraph of the provision, Article 52(2), states that the right to compensation for non-validated bonds created by Article 52 "can be asserted *only after it has been finally adjudicated* that the conditions" set forth in Article 52(1) have been met. *Id.* (emphasis added). Article 52(2) further states that "[e]xclusive jurisdiction to make such adjudication

shall rest with the Chamber of Settlement of Securities of the district in which the issuer has its seat." *Id.*

These additional requirements make plain that the absence of prejudice to the holders of validated bonds is necessary, but not sufficient, to permit Mortimer to bring claims relating to the West German Bonds under Article 52 without their prior validation pursuant to the Validation Law. As Mortimer has not alleged that the preconditions to bringing a compensation claim under this provision were adjudicated in its favor or even that, as a factual matter, the preconditions are satisfied with respect to the West German Bonds, we hold that Mortimer's argument fails on its own terms.

In sum, a non-assenter can only enforce bonds covered by the Validation Law after complying with the validation procedures and explaining why any delay in doing so is excusable. Like the district court, we hold that Mortimer, by not satisfying either criterion, has failed to set forth a plausible basis in either the complaint or the proposed amended complaint for enforcing the West German Bonds at this stage. Indeed, allowing Mortimer to do so would undercut the purpose of the Validation Law by eliminating any guarantee that Mortimer's West German Bonds, allegedly valued at over $400,000,000, are in fact legitimate. Our decision is consistent with past cases, which have evaluated the enforceability of foreign currency bonds covered by the Validation Law only after the bondholder has registered and submitted its

bonds for evaluation in accordance with the Law, and the Validation Board has adjudicated their validity. *See Teplin v. Fed. Republic of Germany*, No. 81-1874, 1982 U.S. App. LEXIS 12629, at *2-3 (D.C. Cir. Aug. 18, 1982) (per curiam) (finding a bondholder's claims to be "not properly before th[e] court" because he failed to validate the bonds, "thus making them enforceable in U.S. courts"); *cf. Cavac Compania Anonima Venezolana de Administracion y Comercio v. Bd. for the Validation of German Bonds in the United States*, 189 F. Supp. 205, 208 (S.D.N.Y. 1960) (permitting arbitration after a Validation Board refused to validate the bonds at issue); *Abrey*, 153 F. Supp. at 338 (permitting an independent trial respecting the bonds' validity after they were declared invalid by a Validation Board). We therefore affirm the dismissal of Mortimer's claims respecting the West German Bonds and the denial of leave to amend.

## CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED, in part on alternative grounds.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| MORTIMER OFF SHORE SERVICES, LTD., *Plaintiff*, -against- FEDERAL REPUBLIC OF GERMANY, *Defendant.* | : | 05 Civ. 10669 (GEL) **OPINION AND ORDER** (Filed Sep. 27, 2007) |

Peder A. Garske, Mark A. Cymrot, Ona T. Wang, Baker & Hostetler LLP, Washington, DC, *for plaintiff.*

Jeffrey Harris, Max Riederer von Paar, Rubin, Winston, Diercks, Harris & Cooke, LLP, Washington, DC, *for defendant.*

GERARD E. LYNCH, *District Judge*:

Plaintiff Mortimer Off Shore Services, Ltd., brings this action to recover from defendant Federal Republic of Germany ("Germany") the principal and interest on 351 bearer bonds ("the Bonds") in its possession. Germany moves to dismiss the action, arguing that the Court lacks subject matter jurisdiction over plaintiff's claim pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA"). Alternatively, Germany argues that, because plaintiff has not complied with the bond validation process

established by treaty and German law as a prerequisite to suit on the Bonds, the Bonds are unenforceable, and therefore plaintiff has failed to state a claim upon which relief can be granted. The motion will be granted.

## BACKGROUND

### The Treaty and Validation Law[1]

In 1953, the United States entered into a treaty with the Federal Republic of Germany, which then encompassed only West Germany, for "the orderly settlement of the obligations arising from German dollar bonds" in order to satisfy the "[e]xternal [d]ebt" West Germany incurred during World War II.[2] To facilitate this "settlement," the Treaty incorporated by reference legislation enacted by West Germany in 1952, pursuant to which West Germany assumed

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[1] The Court recites here only those historical facts that are directly relevant to plaintiff's claim. For a detailed discussion of the history of the Treaty and the events leading up to its ratification, *see Abrey v. Reusch*, 153 F. Supp. 337, 339-42 (S.D.N.Y. 1957).

[2] *See* Certain Matters Arising from the Validation of German Dollar Bonds, U.S.-F.R.G., Apr. 1, 1953, 4 U.S.T. 885, at Preamble ("Treaty" or "Treaty of 1953"). The Treaty was preceded by the London Debt Accord, in which West Germany agreed to satisfy its debt arising from World War II by assuming liability for certain obligations "due" or "entered into" prior to the end of the War. Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, Art. 4 ("London Debt Accord"). The London Debt Accord was also incorporated by reference into the Treaty. 4 U.S.T. 885, at Art. V.

liability for certain "foreign currency bonds" that had been issued by German banks prior to the end of World War II ("the Validation Law").[3] Thus, by operation of the Validation Law, West Germany assumed liability for certain bonds issued prior to the end of World War II, and by operation of the Treaty, its liability was extended to bonds offered in the United States. *See* Validation Law, BGBl. I at 327, Schedule C.IV (listing the bonds offered in the United States and covered by the Validation Law).

However, West Germany did not assume liability for the bonds without qualification. Instead, before the bonds can be enforced, the Validation Law requires bondholders to register their bonds with either the German Examining Agency or a Validation Board in the country of offering. *See id.* at 306, Art. 3; *id.* at 307, Art. 8; *id.* at 310-11, Art. 23.[4] If the bonds are not

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[3] *See* Gesetz zur Bereinigung von deutschen Schuldverschreibungen, die auf auslandishe Wahrung lauten [Validation Law for German Foreign Currency Bonds], Aug. 25, 1952, BGBl. I at 306, Art. 1(1) (F.R.G.).

[4] Although the Validation Law requires the bonds to be reviewed and examined by a board of "foreign representatives," BGBl. I at 307, Art. 7, the functions of the foreign representatives were transferred to the Validation Board by a 1953 agreement between the United States and Germany ("the Agreement on Validation Procedures"), which in turn was incorporated into German law and incorporated by reference into the Treaty. *See* Treaty of 1953, 4 U.S.T. 885, at Art. 2 (requiring bonds to be validated by either the Examining Agency or a Validation Board as established by the Agreement on Validation Procedures); Second Implementing Ordinance under the Validation Law for

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registered and examined by the appropriate agency, they are deemed invalid and unenforceable. *See id.* at 306, Art. 2, 3; *id.* at 317, Art. 50. Accordingly, because the Treaty incorporated the Validation Law by reference, any bonds subject to the Treaty are "[un]enforceable unless and until [they are] validated by" the appropriate agency.[5] Treaty of 1953, 4 U.S.T. 885, at Art. II. However, a bondholder has the right to appeal the agency's determination, either to an arbitration board, a German court, or an appropriate court in the country of offering. Validation Law, BGBl. I at 312-13, Arts. 31, 33.

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German Foreign Currency Bonds, March 7, 1953, BGBl. II at 303-04. *Cf. Abrey*, 153 F. Supp. at 340-41.

[5] According to this Court's decision in *Abrey*, the validation requirement arose from concerns over the legitimacy of pre-war German bonds looted by Russian troops after World War II. Prior to World War II, many of the bonds had been "repurchased and reacquired by the issuers for eventual retirement," and "no longer represented valid obligations." *Abrey*, 153 F. Supp. at 339. However, during the war, the issuers could not present the bonds to the American trustees or paying agents for cancellation. *Id.* Accordingly, large numbers of these uncancelled bonds, in negotiable form, remained in German bank vaults. *Id.* Upon Germany's surrender, Russian occupation forces seized and recirculated the uncancelled, negotiable German bonds that had been found in German bank vaults within the area of Russia's control. *Id.* In order to avoid enforcement of the looted bonds, a validation procedure was created pursuant to which the bonds were pre-screened before enforcement to determine whether they were valid or were among the looted bonds originally seized by the Russians. *Id.*

**Plaintiff's Claim**

In 2005, plaintiff brought suit in this Court seeking payment on 351 bearer bonds in its possession. (Comp. ¶ 1.) The Bonds, entitled "German Provincial & Communal Bank Consolidated Agricultural Loan Secured Sinking Fund Gold Bonds Series A," were issued on or about June 1, 1928, as part of a German national program for improving agricultural conditions in Germany, and were offered in the United States. (*Id.* ¶¶ 6, 7; *see* BGBl. I at 327, Schedule C.IV(19) (listing the same bonds as "[o]ffer[ed] [in the] United States").) The Bonds were issued by a consortium of fourteen banks ("obligor banks") located both within and outside of the territory constituting West Germany between the end of the war and the reunification of Germany in 1990. (Comp. ¶¶ 7, 9.) The obligor banks financed the Bonds by contracting for loans and distributing the proceeds to German farmers. (*Id.* ¶ 7.) Each obligor bank was severally liable for a certain portion of the value of each of the Bonds, proportionate to its share of the underlying loans. (*Id.* ¶ 9.) According to plaintiff, obligor banks located outside of the territory constituting West Germany after reunification are liable for 64.5% of the Bonds' debt. (Lang. Decl. ¶ 4(a).)

The Bonds had a 30-year term, and were listed on the New York Stock Exchange, marketed in the Southern District of New York, and made payable in the Borough of Manhattan, New York City. (Comp. ¶¶ 6, 8.) The value of the Bonds (assuming their validity) is currently estimated to exceed $400,000,000

in unpaid principal and interest. (*Id.* ¶ 16.) In responding to the motion to dismiss, plaintiff makes clear that it has not submitted the Bonds for validation and that it contends it need not do so. (Pl. Mem. 9-12.)

According to plaintiff, Germany "is liable for the outstanding and unpaid principal and interest under the Bonds." (Comp. ¶ 11.) Germany, however, has refused to pay on the Bonds. (*Id.* ¶ 18.) Thus, plaintiff demands judgment against Germany for the full amount owing on the Bonds.

## DISCUSSION

I. Rule 12(b)(1) Motion

Germany moves to dismiss plaintiff's claim for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), arguing that as a sovereign nation, it is immune from suit under the FSIA. Plaintiff argues that Germany's assumption of liability for bonds fits within the FSIA's exception for commercial activity, and thus that sovereign immunity is inapplicable. Germany argues that the commercial activity exception does not apply because the Treaty, the vehicle by which West Germany assumed liability over bonds offered in the United States, was the political act of a sovereign, and therefore non-commercial in nature. Pursuant to controlling Supreme Court precedent, Germany's assumption of liability for the Bonds constitutes commercial activity under the FSIA, and

therefore the Court has subject matter jurisdiction over plaintiff's claim.

In determining the existence of subject matter jurisdiction, a court may consider evidence contained in affidavits or public documents as well as facts alleged in the pleadings. *See Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986). The Court must draw all material factual inferences in the plaintiff's favor, *see Hason v. Office of Prof'l Med. Conduct*, 314 F. Supp. 2d 241, 246 (S.D.N.Y. 2004); however, "argumentative inferences favorable to the party asserting jurisdiction should not be drawn." *Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992) (citation omitted).

When a defendant moves to dismiss a complaint on the basis of foreign sovereign immunity, that defendant "must present a prima facie case that it is a foreign sovereign." *See Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002) (citation and internal quotation marks omitted). Once that initial burden is met, "the plaintiff has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted." *Id.* (citation and internal quotation marks omitted). Only if the plaintiff discharges this burden of production does the "ultimate burden of persuasion" pass back to the "alleged foreign sovereign" defendant. *Id.* (citation and internal quotation marks omitted). That burden must be met by a preponderance of the evidence. *See Robinson v. Gov't of Malaysia*, 269 F.3d 133, 141 n.8 (2d Cir. 2001).

The FSIA is the sole source of subject matter jurisdiction against a foreign state.[6] *Cabiri v. Gov't of Republic of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999), citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). Under the FSIA, a foreign state is "immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1603. Accordingly, because Germany is unquestionably a sovereign foreign state, the Court lacks subject matter jurisdiction over plaintiff's suit unless plaintiff shows that a specified exception applies to its claim. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

Plaintiff relies on the FSIA's commercial activity exception to gain subject matter jurisdiction over its claim. The commercial activity exception is the "most significant of the FSIA's exceptions." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). Under the commercial activity exception, a foreign state is not immune from suit if "the action is based [1] upon a commercial activity carried on in the

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[6] Plaintiff asserts that the Court has jurisdiction in this case pursuant to 28 U.S.C. § 1330. (Comp. ¶ 4.) Section 1330 confers "original jurisdiction" over claims against foreign states on federal district courts. 28 U.S.C. § 1330. However, § 1330 confers original jurisdiction on the Court only to the extent that "the foreign state is not entitled to immunity under" the FSIA. *Id.* Thus, the Court must determine whether Germany is entitled to immunity under the FSIA in order to determine whether it has jurisdiction pursuant to § 1330.

United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

Plaintiff argues that Germany's conduct constitutes commercial activity "outside the territory of the United States" that caused a "direct effect in the United States," thereby satisfying the FSIA's third commercial activity exception.[7] Germany does not dispute that its assumption of liability for certain bonds offered in the United States constitutes "an act outside the Territory of the United States," or that this conduct "cause[d] a direct effect in the United States."[8] However, Germany argues that its execution

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[7] Plaintiff also argues that Germany is not entitled to immunity because "the provincial banks" that originally issued the Bonds "engaged in commercial activity in the United States" by "market[ing], issu[ing], and [making the Bonds] payable in New York," thereby satisfying the FSIA's first commercial activity exception. (Pl. Mem. 8.) Because Germany's conduct satisfies the FSIA's third commercial activity exception, it is unnecessary to consider whether the initial issuance of bonds constitutes "commercial activity carried on in the United States" under the FSIA's first commercial activity exception.

[8] Indeed, if plaintiff is correct that Germany assumed liability for the Bonds, the impact would not merely be a "ripple[ ]" that "eventually reach[ed] the shores of the United States," but the obligation by Germany to satisfy an estimated $400,000,000 in principal and interest on bonds that are payable in New York. *Virtual Countries, Inc.*, 300 F.3d at 236; *see id.* ("[A]n effect is

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of the Treaty, the vehicle by which its liability was assumed, was a "[p]olitical act[ ] by a foreign state" (Def. Mem. 12), and therefore not commercial activity under the FSIA.

According to the FSIA, "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1605(d). The Supreme Court clarified the commercial activity test in *Weltover*. In that case, plaintiffs held Argentine bonds that the government had issued as part of "emergency measures" it had adopted to refinance its debt. 504 U.S. at 609. The bonds had a repayment schedule for their principal and interest, and New York was the designated place of performance where interest payments were to be made. *Id.* at 619. However, when the bonds matured, Argentina attempted to unilaterally reschedule the bond payments. *Id.* at 610. Plaintiffs brought a breach-of-contract action to force Argentina to satisfy the bonds, relying on the FSIA's commercial activity exception as the basis for subject matter jurisdiction. *Id.*

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direct if it follows as an *immediate* consequence of the defendant's activity.") (citation and internal quotation marks omitted) (emphasis and alteration in original); *see, e.g.*, *Weltover*, 504 U.S. at 618-19 (finding "little difficulty concluding that Argentina's unilateral rescheduling of maturity dates on the [bonds] had a direct effect in the United States" because New York was the contractually-designated "place of performance") (internal quotation marks omitted).

The *Weltover* Court held that the relevant inquiry in a commercial activity determination is whether the foreign state's conduct was "the *type* of action[ ] by which a private party engages in 'trade and traffic or commerce.'" *Id.* at 614 (citations omitted) (emphasis in original). The motivation for the state's conduct is irrelevant to determining whether the conduct was commercial; thus, it was irrelevant that Argentina had issued the bonds "with the aim of fulfilling uniquely sovereign objectives." *Id.* The Court found that, by issuing bonds, Argentina had acted "not as regulator of a market, but in the manner of a private player within it." *Id.* Accordingly, Argentina's conduct constituted commercial activity under the FSIA, and therefore Argentina was not immune from plaintiffs' suit. *Id.* at 617.

The facts of this case are substantially similar to those of *Weltover*. Both the West German and Argentine governments entered the bond market to "address a domestic [financial] crisis." *Id.* at 616. *See* Treaty of 1953, 4 U.S.T. 885, at Preamble (characterizing the goal of the Treaty as "the settlement of Germany's external [debt] obligations"). But the public, governmental *purpose* of the action is not determinative. Borrowing money, or guaranteeing or assuming the debt of others, is commonplace commercial activity, engaged in by non-governmental actors, not a unique power of sovereign states. Like the bonds in *Weltover*, the bonds in this case are "garden-variety debt instruments" that are not restricted to the "authoritative control" of a sovereign acting as a

"regulator of [the] market," *Weltover*, 504 U.S. at 614, 615; indeed, the non-governmental nature of the bonds in this case is even clearer than that of the bonds in *Weltover*, as the bonds in this case were actually issued by private entities. Like the bonds in *Weltover*, the Bonds "may be held by private parties; they are negotiable and may be traded on the international market . . . ; and they promise a future stream of cash income." *Id.* at 615. In addition, like the bonds in *Weltover*, the bonds in this case had a payment schedule and were payable at maturity, further establishing their "garden-variety" nature. (Comp. ¶¶ 6, 8.) *See Antares Aircraft, L.P. v. Fed. Republic of Nigeria*, 999 F.2d 33, 34-35 (2d Cir. 1993) ("Like bonds issued by a private entity, [the bonds in *Weltover*] had a repayment schedule including periodic interest and principal repayment at maturity.").

Applying the holding in *Weltover* to this case, by assuming liability for bonds, Germany was acting not as a "regulator of the market," but as a private player within it. It is axiomatic that one party may assume liability for bonds that had been issued by another party, *Nat'l Bank v. Grand Lodge*, 98 U.S. 123 (1878); Germany's conduct was therefore "analogous to a private commercial transaction." 504 U.S. at 616. Even if Germany's assumption of liability for the Bonds was motivated by "uniquely sovereign objectives" such as payment of its World War II debt, "it is irrelevant *why* [Germany] participated in the bond market in the manner of a private actor; it matters only that it did so." *Id.* at 617. Argentina's borrowing in

*Weltover*, as much as Germany's here, was motivated by reasons of state unique to a sovereign government that differ from the commercial goals of corporate bond issuers. Similarly, it is irrelevant that Germany's conduct "did not have the ordinary commercial consequence of raising capital or financing acquisitions." *Id.* at 616. What matters is that Germany's attempt to "refinance" debt by assuming liability for bonds is the "type" of activity that private parties "regularly" engage in. *Id.*; *see id.* ("Engaging in a commercial act does not require the receipt of fair value, or even compliance with the common-law requirements of consideration.")

Germany makes two principal arguments to distinguish this case from *Weltover*. First, Germany argues that whereas Argentina had actually issued bonds in *Weltover*, Germany did not issue any bonds in this case, but merely assumed liability for them. However, this is a distinction without a difference. Just as the issuance of bonds by a sovereign is commercial activity because private parties also may issue bonds, the assumption of liability for bonds by a sovereign is commercial activity because private parties also may assume liability for bonds. *See id.* (finding Argentina's "restructur[ing]" of its bond debt to be commercial activity because private parties also may restructure their bond debt). Any private party could have done the same thing that Germany did here; there was "nothing distinctive about [Germany's] assumption of debt (other than perhaps its

purpose) that would cause it" to be classified as non-commercial activity. *Id.* at 615.

Alternatively, Germany argues that, because it assumed its liability pursuant to an international treaty, its conduct was "political" and therefore does not constitute commercial activity. Specifically, Germany argues that "government to government agreement[s] . . . do not fall under [the FSIA's] commercial activity [exception]," even where such agreements "affect[ ] the commercial activities of its citizens." (Def. Reply 2.) In support of its argument, defendant cites *Wolf v. Fed. Republic of Germany*, 95 F.3d 536 (7th Cir. 1996), in which Germany's international agreement to pay war reparations to Holocaust survivors was deemed noncommercial activity, and *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994), in which the kidnapping of American citizens by Iranian agents to force the unfreezing of Iran's assets was deemed non-commercial activity. Germany's interpretation of the commercial activity exception misunderstands the relevant case law and would undermine the Supreme Court's holding in *Weltover*.

It is irrelevant that Germany's commercial obligation here arose pursuant to a treaty rather than the signing of a contract; the relevant inquiry is the nature of Germany's conduct, not the vehicle by which the conduct occurred or the fact that the conduct was the result of an intergovernmental negotiation or agreement. Thus, *Wolf* and *Cicippio* are wholly inapposite to this case. The determinative factor in *Wolf* was not that Germany's obligation arose pursuant to

an international agreement. Rather, Germany's conduct was deemed non-commercial because only sovereigns may engage in war, and therefore war reparations by their nature are not "the kind of ordinary commercial transaction that a private party might undertake." 95 F.3d at 543; *see Hirsh v. State of Israel*, 962 F. Supp. 377, 382 (S.D.N.Y. 1997) (finding that the "payment of reparations to Holocaust survivors" is "quintessentially governmental behavior"). Similarly, the determinative factor in *Cicippio* was not that plaintiffs were kidnapped in order to force intergovernmental negotiations; instead, the kidnapping was deemed non-commercial because "[t]he United States government was acting purely as a sovereign regulator when it froze the assets of Iran and its citizens, and the government of Iran's alleged efforts to release the freeze were likewise peculiarly sovereign." 30 F.3d at 168. Thus, neither Iran nor Germany were acting as private parties within the commercial market: only a sovereign, and not a private party, can pay war reparations, and only a sovereign, and not a private party, can act to release its frozen assets.

Moreover, Germany's reading of the commercial activity exception would undermine the holding of *Weltover*. Although private parties cannot enter into treaties, private parties also cannot enact laws, or privatize industries, or do many of the other things that sovereigns must do *qua* sovereigns in order to engage in commercial activity such as borrowing money. If the fact that Germany assumed this liability by

treaty rendered its activity in the bond market non-commercial, then much market activity carried on by a foreign state would not constitute commercial activity, as sovereigns often act by means that are unavailable to private parties. This is plainly not the intended consequence of *Weltover*; instead, *Weltover* demands that the Court look behind the sovereign character of the means to determine whether the *nature* of the activity is of the "type" that private parties also engage in during the course of "trade and traffic or commerce." *See WMW Machinery, Inc. v. Werkzeugmaschinenhandel GmbH IM Aufbau*, 960 F. Supp. 734, 740 (S.D.N.Y. 1997) ("[The commercial activity] determination requires the Court to look beyond generalized characterizations to the particular conduct that would entitle plaintiffs to relief under their theory of the case."); *see, e.g., Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for Galadari*, 12 F.3d 317, 320 (2d Cir. 1993) (finding the United Arab Emirates' "first attempt to frame an insolvency law" to constitute commercial activity); *Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736, 750 (S.D.N.Y. 2004) (finding government's privatization of oil industry to constitute commercial activity). *Cf. Em Ltd. v. Republic of Argentina*, 473 F.3d 463, 483 n.21 (2d Cir. 2007) (stating that a government's "regulatory actions in connection with the receipt of [a] loan" may constitute commercial activity). Thus, whether a government acts pursuant to the enactment of a law or regulation, privatization of an industry, ratification of a treaty, or some other measure that is only available to sovereigns, such a

consideration is irrelevant to the determination of whether the activity was commercial.[9]

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[9] The Second Circuit's recent decision in *Em Ltd.* does not conflict with the Court's holding in this case. In *Em Ltd.*, plaintiffs attempted to attach funds held by the Argentinian [sic] national bank to satisfy a debt arising from Argentina's non-payment on certain bonds. 473 F.3d at 465. Under the FSIA, the property of a foreign state is not immune from attachment if "the property is or was used for . . . commercial activity." 28 U.S.C. § 1610(a). Thus, plaintiffs argued that their attachment claims were not subject to the FSIA because the bank had used the attached funds to repay Argentina's debt to the International Monetary Fund ("IMF"), which plaintiffs asserted constituted commercial activity under the FSIA.

The Circuit applied *Weltover* to determine whether Argentina's debt payment to the IMF constituted commercial activity. 473 F.3d at 481-84. The court concluded that Argentina's issuance of bonds in *Weltover* was not analogous to its repayment of debt to the IMF. Because the IMF is a "unique cooperative international institution" that has no counterpart in the commercial marketplace, Argentina's "relationship with the IMF is not commercial in nature." *Id.* at 482. "[W]hen [Argentina] borrows from the IMF, it exercises power[s] peculiar to sovereigns," *id.* (citation and internal quotation marks omitted), and such activity therefore "takes place outside the commercial marketplace." *Id.* at 484.

Although the Circuit recognized that the IMF was established by, and Argentina's responsibilities to the IMF are governed by, treaty, the existence of the treaty was merely support for the Circuit's finding that "[t]he IMF is a unique cooperative international institution" of which *only nations*, and not private parties, could be members. *Id.* at 482. Thus, the existence of a treaty evidenced that private parties were excluded from interacting with the IMF on any level, from membership to financial services, because the IMF was purely a "diplomatic" creation that had no analogous counterpart in private commerce. *Id.* at 484. That is plainly not the case with the bond

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Although it may be difficult in some cases to separate the "purpose" of a state's conduct from its "nature," *Weltover*, 504 U.S. at 617, the Court has no such problem here. The Supreme Court has already drawn an almost identical line in *Weltover*, and all the Court has to do here is apply that line. Thus, because the FSIA's commercial activity exception applies to plaintiff's claim, Germany is not entitled to sovereign immunity here. Accordingly, the Court has subject matter jurisdiction over plaintiff's claim.

## II. Rule 12(b)(6) Motion

### A. Motion to Dismiss Standard

Germany also moves to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that it does not state a claim upon which relief may be granted. A complaint may be dismissed pursuant to Rule 12(b)(6) where the complaint fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1974 (2007). As the Second Circuit has recently stated, *Twombly* requires that a plaintiff satisfy "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where

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market or the bonds at issue here; bonds, unlike IMF loans, are "garden-variety debt instruments" that are "available in the commercial market," *id.* at 483-84, and anyone – government and private party alike – may enter the bond market.

such amplification is needed to render the claim plausible." *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of actions will not do." *Twombly*, 127 S. Ct. at 1964-65 (internal quotation marks omitted). In order to state a claim, the factual allegations contained in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 1965.

When deciding a 12(b)(6) motion, the Court must take as true the facts as alleged in plaintiff's complaint. *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 521 (2d Cir. 2006); *Bolt Elec., Inc. v. City of New York*, 53 F.3d 465, 469 (2d Cir. 1995). It may consider documents incorporated in the complaint by reference. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002). All reasonable inferences must be drawn in the plaintiff's favor. *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004). However, "[g]eneral, conclusory allegations need not be credited . . . when they are belied by more specific allegations of the complaint." *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995); *Whyte v. Contemporary Guidance Servs., Inc.*, No. 03 Civ. 5544, 2004 WL 1497560, at *3 (S.D.N.Y. July 2, 2004).

B. Application of the Treaty and Validation Law

Germany argues that, because plaintiff has failed to comply with the bond validation procedures established by the Validation Law, plaintiff's bonds are unenforceable and therefore plaintiff cannot receive relief from this Court. Conversely, plaintiff argues that a portion of the Bonds are not subject to the Validation Law; thus, plaintiff argues that the Court may enforce that portion of the Bonds, notwithstanding plaintiff's failure to comply with the bond validation procedures.[10] However, because the Validation Law is the only apparent source of Germany's liability on the Bonds, defendant's motion will be granted.

According to the Treaty, "[n]o bond" listed in the Validation Law "[is] enforceable unless and until it shall be validated" either by the Examining Agency in Germany or by the Validation Board in the country of offering. 8 U.S.T. 885, at Art. II. In order to be validated, the bonds must be registered within one year (or two years if failure to register was not due to the registrant's gross negligence) from the Opening Date, which is defined in the Validation Law as six months from August 25, 1953. *See* BGBl. I at 310, Art. 19, 21. Once the bonds are registered, the Validation Law

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[10] None of the Bonds were financed entirely by one obligor bank; instead, each bond was financed by the consortium of obligor banks. Thus, according to plaintiff, each obligor bank was only responsible for a portion of the Bonds proportionate to its share of the Bonds' underlying debt as financed by the consortium. (Lang Decl. ¶ 4.)

requires an administrative hearing at which the registrant must establish that the bond was held outside of Germany on January 1, 1945, that the registrant was the "lawful acquirer" of the bond, or that the bond has been "restituted" to the registrant after being confiscated prior to May 8, 1945. *Id.* at 306, Art. 3. The registrant has the burden of proving that the bonds are entitled to be validated. *Id.* at 315, Art. 41.

Germany argues that plaintiff was required to comply with the terms of the Treaty and the Validation Law before the Bonds may be enforced in this Court. Thus, since plaintiff did not register its bonds or prove the Bonds' validity at an administrative hearing, Germany argues that this Court cannot enforce the Bonds. *See, e.g., Teplin v. Fed. Republic of Germany*, No. 81-1874, 1982 U.S. App. LEXIS 12629, at *1 (D.C. Cir. Aug. 18, 1982) (affirming summary judgment for Germany because "the contested bonds . . . had not been validated in accordance with [the] legal requirements");[11] *Cavac Compania Anonima Venezolana de Administracion y Comercio v. Bd. for the Validation of German Bonds in the U.S.*, 189 F. Supp. 205 (S.D.N.Y. 1960) (considering the enforceability of

[11] *Teplin* is an unpublished *per curiam* opinion. 1982 U.S. App. LEXIS 12629. However, the considered judgment of a panel of respected appellate court judges is at least as instructive as such freely-citable materials as student-authored law review notes, especially in a case such as this one in which there is scant precedential authority.

bonds only *after* the Validation Board denied validation); *Abrey*, 153 F. Supp. 337 (same). Plaintiff does not dispute that, pursuant to the Validation Law, Germany assumed liability for the portion of plaintiff's bonds backed by the West German obligor banks. (*Compare* Comp. ¶ 9, *with* BGBl. I at 327, Schedule C.IV(19).) Thus, plaintiff concedes that, because it has not complied with the terms of the Treaty and Validation Law, it cannot receive relief from this Court on that portion of the Bonds issued by obligor banks in West Germany.

Nevertheless, plaintiff argues that relief may be granted on that portion of its bonds backed by obligor banks located in territory that was, at the time of the enactment of the Treaty and the Validation Law, part of East Germany. Specifically, plaintiff argues that the Validation Law does not apply to the portion of the value of its bonds that was backed by obligor banks outside West Germany because the portion of its bonds financed by obligor banks that were not located in West Germany was specifically excluded from the reach of the Validation Law. Moreover, plaintiff argues that events that occurred after the execution of the Treaty, such as the Treaty of 1960 which extended the Validation Law to certain bonds (not included those at issue in this case) issued by East German banks,[12] and the Unification Treaty of

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[12] *See* Zweites Abkommen zwischen der Bunderepublik Deutschland und den Vereinigten Staaten von Amerika uber gewisse Angelegenheiten, die sich aus der Bereinigung deutscher

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1990 which specifically excluded the Validation Law from incorporation into German law upon reunification,[13] establish that the Treaty and Validation Law do not apply to the portion of its bonds that was financed by East German obligor banks. Therefore, plaintiff argues that the Court must deny defendant's motion to dismiss and allow the parties to proceed with discovery so that plaintiff may conclusively determine the portion of its bonds that are not subject to the Validation Law.

However, to survive this motion to dismiss, plaintiff cannot simply seek to disprove Germany's defense; instead, plaintiff must affirmatively plead the source of Germany's obligation to satisfy the Bonds, because only if such a source exists has plaintiff stated a claim upon which the Court can potentially grant relief. To state a claim upon which the Court can potentially grant relief, plaintiff need only provide "a short and plain statement of the claim showing that the plaintiff is entitled to relief."

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Dollarbonds ergeben [Second Agreement between the Federal Republic of Germany and the United States of America Regarding Certain Matters Arising from the Validation of German Dollar Bonds], March 3, 1961, BGBl. II at 464-69 [hereinafter Treaty of 1960].

[13] *See* Vertrag zwischen der Bundesrepublik Deutschland und der Deutchen Demokratischen Republik uber die Herstellung der Einheit Deutschlands (Einigungsvertrag) [The Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of Germany Unity (Unification Treaty)], Aug. 31, 1990, BGBl. II at 889, *translated in* 30 I.L.M. 457 [hereinafter Reunification Treaty].

Fed. R. Civ. P. 8(a). This standard is designed to provide "fair notice" to defendants of "the nature of the case," allowing defendants "to answer and prepare for trial." *Wynder v. McMahon*, 360 F.3d 73, 79 (2d Cir. 2004); *see id.* ("The key to Rule 8(a)'s requirements is whether adequate notice is given."). Although the pleading standard is "lenient," *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988), dismissal is required where the complaint does not include a claim upon which the Court could grant relief.

The complaint alleges that "Germany is liable for the outstanding and unpaid principal and interest under the Bonds." (Comp. ¶ 12.) The complaint is vague about the source of this liability; plaintiff alleges that Germany generally "guaranteed, succeeded to, and/or assumed" liability for the Bonds, and contends that because Prussia had "guaranteed" some of the obligor banks when the Bonds were issued, the Court may assign the same liability to Germany. (*Id.* ¶¶ 10, 11.) During oral argument, plaintiff elaborated on this theory, arguing that Germany's successor liability is located in "various sources; statements and representations by the government reflected in various treaties, reflected in some of the early post[-]war activities." (Tr. 40.) Thus, plaintiff argues that Germany's assumption of debt is rooted, "[n]ot solely" in a juridical document such as a treaty, but in "multiple sources" that reflect, "from an evidentiary point of view," Germany's assumption of liability for the Bonds. (*Id.*)

In an ordinary commercial dispute between private parties, the conclusory allegations that an entity "guaranteed, succeeded to, and/or assumed" liability for bonds might well be sufficient to satisfy the Rule 8(a) standard. As it is axiomatic that a private party may legally assume debt through a variety of measures, ranging from a written contract to an oral agreement, *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1538 (2d Cir. 1997), the precise means by which the defendant assumed liability would be a mere matter of evidentiary detail, that would not need to be pleaded. Moreover, the common law doctrine of successor liability allows, under certain circumstances, the assignment of liability for the pre-existing debt of a predecessor entity to its successor, even in the absence of an explicit agreement to pay such debt between the successor and creditor. *See Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41 (2d Cir. 2003).

However, unlike private parties, sovereigns can *only* assume liability for debt of predecessor states through explicit acts that leave traces in legal documents. *Yucyco, Ltd. v. Republic of Slovenia*, 984 F. Supp. 209, 218 (S.D.N.Y. 1997) (dismissing claim because plaintiff had failed to allege that the sovereign had "explicitly assumed" its predecessor's role as debt guarantor). In addition, such acts must be voluntarily and affirmatively undertaken by the successor state; the common law doctrine of successor liability is inapplicable to successor sovereigns because sovereigns may only voluntarily assume debt through

*affirmative acts* such as enacting a law or entering into an international agreement: "There is no rule of law that automatically subrogates successor states to their predecessor's debt." *767 Third Ave. Assocs. v. Consulate General of Socialist Fed. of Yugoslavia*, 218 F.3d 152, 161 (2d Cir. 2000); *see, e.g.*, Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 Harv. Int'l L. J. 355 (2001) (discussing the various measures by which former republics of the Soviet Union, Yugoslavia, and Czechoslovakia assumed the debt of their predecessor states, all of which involved affirmative acts by the republics) [hereinafter Williams & Harris, *State Succession*]. Speeches, even by heads of state, will not suffice to assign liability for debt to a sovereign, nor can the Court assign liability to a sovereign without locating such liability in a voluntary, affirmative, and explicit act by the sovereign. *See Yucyco*, 984 F. Supp. at 218 ("As a successor state, Slovenia is not legally bound by any contract executed by the former Yugoslavia unless Slovenia has voluntarily 'assumed' the responsibilities of the predecessor state and 'the other party or parties thereto agree or acquiesce.'"), citing Restatement (Third) of Foreign Relations Law § 210(3).

Moreover, such an assignment by the Court, without a voluntary, affirmative, and explicit act by Germany, would be a usurpation of the executive power and would require resolution of an eminently political question best left to the Executive Branch and the international community, i.e., how to structure

and allocate the debt of a successor state. *See 767 Third Ave. Assocs.*, 218 F.3d at 160 ("A determination by this court of the allocation of debt among the successor [states to the former Socialist Federal Republic of Yugoslavia] might hinder or prejudice the future resolution of this issue through negotiations or another determination by the Executive [Branch of the U.S. Government]. Such an outcome would directly 'interfere with executive foreign policy prerogatives.'"), quoting *Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994); *Yucyco*, 984 F. Supp. at 219 (characterizing "the settlement of foreign debts" as "fall[ing] squarely within the ambit of the President's and Congress's constitutional authority"). Thus, only if a successor state assumed liability for its predecessor's debt pursuant to a "controlling agreement, treaty, or similar instrument" may the Court assign liability to the successor for such debt; without such a "legal instrument," the Court would be required to make "policy determinations, . . . for which the Court is ill-suited." *Yucyco*, 984 F. Supp. at 219, citing *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Accordingly, the relevant inquiry here is whether Germany assumed liability for the Bonds through a voluntary, affirmative, and explicit act that may be "interpret[ed] and enforc[ed]" by the Court. *See 767 Third Ave. Assocs.*, 218 F.3d at 162 n.7 ("Certainly, *once the successors resolve these issues by treaty or another type of agreement*, courts may interpret and enforce rights created by such an agreement.") (emphasis added). Such an act would provide the Court

with "satisfactory criteria" by which it may evaluate Germany's liability for the Bonds. *Yucyco*, 984 F. Supp. at 219 (internal quotation marks omitted).

Although the complaint does not specifically plead such a voluntary, affirmative, and explicit act, nevertheless, in an abundance of caution, the Court has searchingly examined the complaint to determine whether such an act could be ascertained. The only such act vaguely alluded to in the complaint is the London Debt Accord. (*See* Comp. ¶ 11 ("After World War II, Germany entered into an agreement with the Allied High Commission in which it assumed liability for the pre-war external debt of the German Reich.") Pursuant to the London Debt Accord, West Germany agreed to satisfy its debt arising from World War II by settling certain obligations "due" or "entered into" before the end of the War. 4 U.S.T. 443, Art. 4. However, West Germany agreed to satisfy its debt pursuant to the London Debt Accord only to the extent that "the pecuniary obligations" *of West Germany* existed prior to the end of the War. 4 U.S.T. 443, Art. 4; *see id.* Art. 25 (stating that the Accord *may* be extended to East German debts upon reunification). Indeed, plaintiff conceded at oral argument that the London Debt Accord did not apply to East German debts.[14]

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[14] Even if the London Debt Accord was extended to East German debts after unification, the Accord incorporates by reference the Validation Law. 4 U.S.T. 443, Annex IV. Art. 25 ("This settlement shall not apply to bonds . . . which require to be validated under the German Validation Law . . . until these bonds . . . have been validated pursuant to the provisions of such

(Continued on following page)

(Tr. 31.) Thus, *West* Germany did not assume the debt of banks in East Germany under the London Debt Accord; indeed, it would have been illogical for West Germany to assume such debt, as West and East Germany were separate political entities at the time of the Accord.

The only other voluntary, affirmative, and explicit acts taken by Germany relevant to the bonds at issue in this case are the Validation Law and the Treaty. Even assuming *arguendo* that, contrary to plaintiff's argument, Germany assumed liability for debts of East German obligor banks pursuant to the Validation Law and Treaty, plaintiff's claim fails. If West Germany did assume liability for the portion of bonds financed by East German obligor banks under the Validation Law and Treaty, then plaintiff's failure to comply with the terms of the Validation Law dooms its claim because bonds subject to the Validation Law are only enforceable under the Treaty upon registration and examination, which plaintiff has failed to do.

Thus, there is no need for more discovery in this case, and there is no need for the Court to determine the impact of the Treaty of 1960 and the Unification Treaty of 1990 on the Validation Law. If plaintiff is correct that the Validation Law did not extend to the portion of the Bonds financed by East German obligor

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law[ ]. . . ."). Therefore, any East German bonds subject to the Accord would also be subject to the Law, and plaintiff still would be required to comply with the validation procedures.

banks, then Germany has assumed no liability for that portion of the Bonds and plaintiff has no claim upon which relief may be granted. Conversely, if the Validation Law does extend to the portion of the Bonds financed by East German obligor banks, then plaintiff has failed to comply with the terms of the Validation Law and also has no claim upon which relief may be granted.

Put simply, plaintiff has not complied with the legal requirements of the Treaty and Validation Law; thus, plaintiff cannot receive relief on its claim with regards to the 35.5% of its bonds that plaintiff does not dispute is subject to the Treaty and Validation Law. If plaintiff is correct that 64.5% of the value of its bonds is not subject to the Treaty and Validation Law, then plaintiff cannot receive relief from the Court with respect to that portion of the Bonds, as Germany has only assumed liability for those bonds that are subject to the Validation Law and plaintiff has not pled another source of liability, nor has another source been located by the Court.[15] There is no middle ground here; Germany only assumed

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[15] If plaintiff is correct that the Validation Law does not apply to the portion of its bonds financed by East German banks, it is unclear whether plaintiff could seek relief from another party, such as the original issuing bank. The Court makes no determination as to whether plaintiff may seek such relief; the Court only finds that whatever relief that is available to plaintiff against Germany itself is contingent upon plaintiff's compliance with the Treaty and Validation Law.

liability over the Bonds as far as the terms of the Treaty and Validation Law, and no further.[16]

This holding neither forecloses plaintiff from seeking payment from Germany for any portion of the Bonds, nor forecloses this Court from reviewing the decision of the Validation Board. Instead, if the Bonds are deemed invalid by the Validation Board, plaintiff can appeal the Board's decision to an arbitration board, a German court, or this Court. *See* Validation Law, BGBl. I at 312-13, Arts. 31, 33, 35. *See, e.g.*, *Abrey*, 153 F. Supp. at 347-48 (finding that the court's review of the validation decision should be plenary). *Cf.* Validation Law, BGBl. I at 313, Art. 33(3) (waiving sovereign immunity for appeals from the validation decision). The Court holds only that plaintiff has not stated a claim upon which relief may be granted *at this time* because plaintiff has not yet complied with the administrative process created by the Validation Law. *See, e.g.*, *Reiter v. Cooper*, 507 U.S. 258, 269 (1992) ("Where relief is available from an

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[16] Indeed, the existence of another source of liability would contravene the goal of the Validation Law, which was enacted to protect West Germany from being forced to pay on "looted bonds" seized by Russian forces. *Abrey*, 153 F. Supp. at 339. Plaintiff has suggested no plausible reason why West Germany would assume liability for the pre-war debt of East German banks, but would not subject those bonds to the same restrictions of the Treaty and Validation Law that apply to bonds issued by West German banks. The protection established by the Treaty and Validation Law exists concurrently with, and not independent of, West Germany's assumption of liability for its pre-war debt.

administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and *must be* of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and *must be dismissed.*") (emphasis supplied).

Accordingly, defendant's motion to dismiss is granted.

## CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is granted.

SO ORDERED.

Dated: New York, New York
September 27, 2007

/s/ Gerard E. Lynch
GERARD E. LYNCH
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| MORTIMER OFF SHORE SERVICES, LTD., *Plaintiff,* | 05 Civ. 10669 (GEL) |
| -against- | **ORDER** |
| FEDERAL REPUBLIC OF GERMANY, *Defendant.* | (Filed Apr. 9, 2008) |

GERARD E. LYNCH, *District Judge*:

On September 27, 2007, this Court dismissed plaintiff's complaint seeking to enforce certain bonds against the Federal Republic of Germany, holding that plaintiff's failure to submit the bonds to the required validation procedure defeated its claim. *Mortimer Offshore Services, Ltd. v. Federal Republic of Germany*, No. 05 Civ. 10669, 2007 WL 2822214 (Sept. 27, 2007). Plaintiff now moves to amend the Court's judgment to permit it to file an amended complaint, adding certain allegations that it claims would avoid the result reached by the Court in dismissing the initial complaint. The motion will be denied.

Plaintiff's motion is essentially an effort to reargue the basic rationale of the Court's ruling, which was that Germany's assumption of liability for the

bonds in question was contingent on compliance with the validation procedure. Two of plaintiff's proposed amendments simply allege variations on the theme that German officials have at various times asserted that Germany is responsible for the pre-war debt of the German Reich. But neither of these acts -- a statement of Chancellor Adenauer and an SEC filing – revokes the conditions set by the Validation Law applicable to the bonds in question.

The other two proposed additions allege that the present Federal Republic has adopted the obligations of the former East German state by taking over its territory and by entering into the Unification Treaty of 1990. Separately or together, these allegations do not explain how the former East German state assumed any liability for these bonds, or how the provisions of the Validation Law have been overcome. As the Court noted in its earlier opinion, "plaintiff has suggested no plausible reason why West Germany would assume liability for the pre-war debt of East German banks but would not subject those bonds to the same restrictions of the Treaty and Validation Law that apply to bonds issued by West German banks. The protection established by the Treaty and Validation Law exists concurrently with, and not independent of, West Germany's assumption of liability for its pre-war debt." *Mortimer*, 2007 WL 2822214, at * 11 n.16.

Finally, the Court rejects plaintiff's effort to recast the current German government as simply a successor government and not a successor state to

the Democratic Republic, the Nazi Reich, the Weimar Republic, and the former state of Prussia. The overwhelming disruption caused by the Nazi regime and its fall is not "a shift in power and authority without fundamental or radical changes," such as "the Labor Party defeating the Conservative Party in U.K. elections." *See* Tai-Heng Cheng, *State Succession and Commercial Obligations* 51 (Transnational Publishers 2006). "State succession is not limited to changes in the international legal personality of a state, but includes any fundamental reorganization of a state that triggers international claims concerning preexisting commercial obligations and requires an international response." *Id.* at 37.

The German state was occupied, destroyed, and reconstituted, first in pieces and then through reunification, and the relation of the present Federal Republic to the pre-war governments of Germany is a classic example of state succession. As the Court extensively discussed, "[t]here is no rule of law that automatically subrogates successor states to their predecessor's debt." *Mortimer*, 2007 WL 2822214, at *9, quoting *767 Third Ave. Assocs. v. Consulate General of Socialist Fed. of Yugoslavia*, 218 F.3d 152, 161 (2d Cir. 2000). In Germany's case, the London Debt Accord, the Treaty of 1953 and the Validation Law constituted an international response to the problem of pre-war German debt. *See Mortimer*, 2007 WL 2822214, at *1. Plaintiff may not evade that settlement by characterizing the several transitions that

have occurred since these bonds were issued as simply a change of government.

Accordingly, plaintiff's motion to amend the judgment is denied.

SO ORDERED.

Dated: New York, New York
April 9, 2008

/s/ Gerard E. Lynch
GERARD E. LYNCH
United States District Judge

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of August, two thousand and ten,

Before: John M. Walker,
Richard C. Wesley,
J. Clifford Wallace,*
Circuit Judges.

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Mortimer Off Shore Services, Ltd.,

Plaintiff-Appellant-Cross-Appellee,

v.

The federal Republic of Germany,

Defendant-Appellee-Cross-Appellant.

**ORDER**

Docket Number:
08-1783-cv (L)
08-2358-cv (XAP)

(Filed Aug. 20, 2010)

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Appellant Mortimer Off Shore Services, Ltd. having filed a petition for panel rehearing and the panel

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* The Honorable J. Clifford Wallace, of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe
Anna Greenidge, Deputy Clerk

## Foreign Sovereign Immunities Act of 1976 (codified as amended in scattered sections of 28 U.S.C.)

### 28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

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### 28 U.S.C. § 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

**28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction**

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

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**28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state**

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that

property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state

with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if

(A) the arbitration takes place or is intended to take place in the United States,

(B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards,

(C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or

(D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That –

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the

person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be

determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed.]

(g) Limitation on Discovery. –

(1) In general. –

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the

cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset. –

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law

enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. – The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. – A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. – Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

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RD (2)

No. 10-814

Supreme Court, U.S.
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# In the Supreme Court of the United States

MORTIMER OFF SHORE SERVICES, LTD.,
*Petitioner*,

v.

FEDERAL REPUBLIC OF GERMANY,
*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Should this Court grant review:

(1) where that portion of the Second Circuit's decision for which Petitioner seeks review does not conflict with decisions of this Court or give rise to a split between the circuits;

(2) where granting the writ would be immaterial to the outcome of the case because review has not been sought by Petitioner as to the Second Circuit's dismissal of those portions of the Complaint over which the lower courts had subject matter jurisdiction under the commercial activity exception of the Foreign Sovereign Immunities Act; and

(3) where the case does not present a recurring important national issue of federal law with far reaching consequences.

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## STATEMENT OF THE CASE

Plaintiff Mortimer Off Shore Services, Ltd. ("Mortimer") filed a complaint against The Federal Republic of Germany in December 2005, seeking payment on bonds it alleged Germany guaranteed. (Pet. App. 15). The Complaint alleged that in 1928, during the Weimar Republic, fourteen German provincial agricultural banks issued bonds that were sold and payable in, among other places, New York City. The Bonds were issued to raise money to improve the agricultural situation in Germany by assisting farmers to reduce their debts and improve agricultural development. Each of the fourteen banks was severally liable for a stated percentage of the Bonds. Some of the issuer banks were located in what became West Germany and some of the issuer banks were located in what became East Germany. The Bonds had a term of 30 years and interest was payable twice a year. In 1933 the German Reich suspended payments on the Bonds. Mortimer alleged that after World War II Defendant Germany guaranteed, succeeded to, and/or assumed the outstanding and unpaid obligations under the Bonds. (Pet. Brief at 4-5).

In response to Mortimer's Complaint, The Federal Republic of Germany filed a motion to dismiss the Complaint, asserting that the district court lacked subject matter jurisdiction, as The Federal Republic of Germany was immune under the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et. seq.*, and that, even if the district court had subject matter jurisdiction, the Bonds were unenforceable because Mortimer was required to, and had failed to, comply with the requirement contained in a bilateral treaty between the United States and The Federal Republic of

Germany entitled "Certain Matters Arising from the Validation of German Dollar Bonds" that the Bonds be registered and validated. 4 U.S.T. 885 (the "1953 Treaty").[1] (Pet. App. 48-49).

The district court ruling was in two parts. First, the district court held that, under the commercial activity exception to the broad grant of immunity contained in the FSIA, as interpreted in *Republic of Argentina v. Weltover,* 504 U.S. 607 (1992), The Federal Republic of Germany was not immune because, according to the district court, by assuming liability for the Bonds The Federal Republic of Germany's conduct was in the manner of a private actor in the marketplace and was not immune under the FSIA because the FSIA's commercial activity exception was applicable. (Pet. App. 53-65).

In the second part of the district court's ruling, the district court first held that, as to the portion of the Bonds issued by West German banks, the Bonds were not enforceable because Mortimer had failed to submit the Bonds to the validation procedure as required by the 1953 Treaty. As to the portion of the Bonds issued by East German banks, the district court held that The Federal Republic of Germany was not liable, as West Germany had never assumed liability for the debts of banks in East Germany. (Pet. App. 77-78).

---

[1] The 1953 Treaty became effective on September 16, 1953 and provides, in pertinent part, in Article II, that "No bond. . . shall be enforceable unless and until it shall be validated either by the Board for Validation of German Bonds in the United States established by the Agreement on Validation Procedures, or by the authorities competent for that purpose in the Federal Republic." 4 U.S.T. at 885.

After the district court denied Mortimer's motion to amend judgment pursuant to Federal Rule of Civil Procedure 59(e) and motion to permit Mortimer to file an amended complaint, (Pet. App. 80-83), an appeal to the Circuit Court by Mortimer and a cross-appeal by The Federal Republic of Germany followed. (Pet. App. 1-2).

The Court of Appeals for the Second Circuit affirmed the district court's dismissal, albeit on somewhat different grounds. As to the East German portion of the Bonds, the Circuit Court held that it lacked subject matter jurisdiction because the FSIA granted immunity to The Federal Republic of Germany and the FSIA's commercial activity exception did not apply. The Circuit Court explained that,

> Accession to liability by the rules of customary international law entails no action by the successor state with respect to the commercial activity at issue - the assumption of liability. The state performs no action when it automatically assumes liability.

*Mortimer Off Shore Servs. v. Fed. Republic of Germany*, 615 F.3d 97, 110 (2d Cir. 2010) (Pet. App. 28).

The Court concluded that,

> Because no "action" within the meaning of § 1605(a)(2) occurs when a successor state accedes to liability, the requirements of FSIA's

> commercial activity exception are not met in that context and jurisdiction under the FSIA based on such an accession will not lie.

*Ibid.*

As to the West German portion of the Bonds, the Circuit Court held that dismissal was proper where the plaintiff admittedly had failed to comply with the 1953 Treaty's validation requirement. (Pet. App. 43-47).

## REASONS FOR DENYING THE WRIT

### A. The *Mortimer* Decision does not create a conflict among the circuits or run afoul of decisions of this Court

The decision of the Court of Appeals for the Second Circuit that a foreign state's automatic assumption of liability to pay a debt instrument by operation of law is not an action based upon a commercial activity pursuant to the Foreign Sovereign Immunities Act is correct, and as there is no mature conflict in the courts of appeals, this Court's review is not warranted.

Petitioner principally relies on the Court of Appeals for the Eleventh Circuit's decision in *World Holdings, LLC v. Federal Republic of Germany*, 613 F.3d 1310 (11th Cir. 2010), to support its assertion that there is a conflict among the circuits. This reliance demonstrates a profound misunderstanding of the *World Holdings* decision. In *World Holdings*, the plaintiff sued The Federal Republic of Germany to recover on bonds which had been issued by Germany. There was no question in *World Holdings* that the

commercial activity exception applied if the 1953 Treaty did not expressly conflict with the FSIA because Germany was the issuer of the bonds and not a third party that allegedly became liable on the bonds by state succession. In fact, as Petitioner recognized, in *World Holdings* Germany conceded that the commercial activity exception applied but for the treaty exception. (Pet. Brief at 24). The only issue in *World Holdings* was whether the commercial activity exception did not apply because the FSIA was "subject to existing international agreements. . . .," *i.e.*, the 1953 Treaty. 28 U.S.C. 1604.

Congress made the FSIA "subject to existing international agreements to which the United States is a party at the time of enactment of" the FSIA. 28 U.S.C. 1604. This Court, in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), held there is a "treaty exception" to the waiver of immunity in Section 1604 of the FSIA. The "subject to existing international agreements" phraseology "applies when international agreements 'expressly conflic[t]' with the immunity provisions of the FSIA." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) [*quoting* H.R.Rep. No. 94-1487, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616] (alteration in original). In *World Holdings*, the Eleventh Circuit decided that the 1953 Treaty did not expressly conflict with the FSIA and, hence, the broad grant of immunity contained in the FSIA as well as its exceptions, including the commercial activity exception, applied. *World Holdings* did not consider, no less decide, whether assumption of liability by state succession to pay a debt instrument was an action within the meaning of the commercial activity exception to the FSIA. Therefore, there is no conflict between the

Eleventh Circuit's *World Holdings* decision and the Second Circuit's decision in *Mortimer*.

Petitioner also relies on two cases that were decided many decades prior to the enactment of the FSIA and, thus, by definition could not conflict with *Mortimer*'s interpretation of the commercial activity exception to the FSIA. *Vilas v. Manila*, 220 U.S. 345 (1911); *Lehigh Valley R. Co. v. Russia*, 21 F.2d 396 (2d Cir. 1927).

Even the cases cited by Petitioner which were decided after the enactment of the FSIA do not contradict the *Mortimer* decision and form a conflict among the circuits. *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 731 F. Supp. 619 (S.D.N.Y. 1990), is a district court decision from a district court within the Second Circuit. *Jackson v. People's Republic of China*, 550 F. Supp. 869 (N.D. Ala. 1982) is a district court opinion which also does not create a conflict among the circuits.

Petitioner also argues that *Mortimer* conflicts with this Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). This is not the case. *Altmann* decided that the FSIA applies to pre-FSIA conduct for cases brought after the FSIA's enactment. It did not decide the question at hand in this matter, *i.e.*, whether state succession under international law without a separate affirmative act is enough to be an action so as to invoke the FSIA's commercial activity exception.

In sum, try as it might, Petitioner's argument that the *Mortimer* decision creates a conflict among the circuits or runs afoul of decisions of this Court

completely fails. None of the cases cited by Petitioner supports Petitioner's argument.

### B. The relief Petitioner seeks, even if granted, would not change the outcome of the case which resulted in a dismissal of Petitioner's Complaint

Petitioner seeks review from this Court solely on the issue of whether the Second Circuit's decision that there was a lack of subject matter jurisdiction as to the East German portion of the Bonds was incorrect. (Pet. Brief at i). Were the Court to issue the writ and subsequently reverse the Second Circuit, the ultimate outcome of the case, *i.e.*, dismissal of Petitioner's cause of action, would not change.

The Bonds which Petitioner sought to enforce were severally issued by 14 German banks, some of which were in what was formerly West Germany and some in what was formerly East Germany. The Second Circuit in *Mortimer* decided that, as to the East German portion, there was a lack of subject matter jurisdiction. It is only on this ruling that Petitioner seeks this Court's review. As to the West German portion, the Second Circuit decided that the district court had subject matter jurisdiction. However, the Second Circuit went on to decide that Petitioner's cause of action was properly dismissed because Petitioner had failed to comply with the 1953 Treaty's validation requirement. That being the case, had the Second Circuit decided that there was subject matter jurisdiction under the commercial activity exception for the East German portion, as Petitioner argues, the East German portion of the Bonds would have been on the same legal footing as the West German portion. As

such, Petitioner's cause of action as to the East German portion of the Bonds would have been dismissed along with the dismissal on the West German portion of the Bonds for failure to comply with the 1953 Treaty's validation requirement.

Were the Court to grant the Petition, there is no way that any subsequent decision by the Court on the issue presented by the Petition, would alter the ultimate outcome of the case, which is dismissal of the Petitioner's cause of action. Therefore, there is no reason that this Court should grant the Petition.

### C. The *Mortimer* decision does not raise recurring issues of federal law with national importance.

Petitioner hyperbolically argues that "the Second Circuit's [ruling] has put at risk billions of dollars of U.S. investments." (Pet. Brief at 34). Petitioner goes on to state that "Inability to enforce sovereign debt instruments will also expose U.S. banking and financial institutions to significant default risk." (Pet. Brief at 35). What Petitioner is really arguing is not that the Second Circuit's interpretation of the commercial activity exception is incorrect, but rather that, as drafted, the commercial activity exception contained in the FSIA, is unwise legislation. This argument ought properly be directly to the legislative branch and surely does not provide a cogent rationale for this Court to grant the Petition. Petitioner's entire argument at Section II.B of the Petition reads exactly like what an advocate would present to a committee of the Congress considering amending the FSIA.

While Petitioner argues that this case presents a frequently recurring legal issue (Pet. Brief at 31), the only cases it cites lend little or no support to this argument. *World Holdings*, *supra.*, does not raise the issue for which Petitioner seeks review because it involves bonds issued by Germany and not allegedly guaranteed by a predecessor government. *Mortimer Off Shore v. The Federal Republic of Germany*, No. 10-1151 (D. Mass filed Sept. 10, 2010), has not been served but appears to be a refiling by the same plaintiff as in the instant case hoping to get a second bite at the apple in another circuit. Lastly, the ongoing case of *Bleier v. Bundesrepublik Deutschland*, No. 08-6254 (N.D. Ill.), does not involve the Bonds at issue in the instant case.

The facts surrounding the application of the FSIA and its exceptions to the unique situation that arose in post-war Germany are not likely to be seen again and do not, in the context of *Mortimer*, raise a recurring issue of federal law with national importance.

## CONCLUSION

The Petition is without merit. There is no conflict in appellate authority as to whether a foreign state's automatic assumption of liability to pay a debt instrument by operation of law is an action based upon "commercial activity" under the Foreign Sovereign Immunities Act. The relief Petitioner seeks would not change the ultimate outcome in the instant case. This case does not present a recurring issue of federal law with national importance. Thus, the Petition should be denied and the writ should not issue.

Respectfully submitted,

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(3)

No. 10-814

SUPREME COURT, U.S.
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In The
# Supreme Court of the United States

MORTIMER OFF SHORE SERVICES, LTD.,

*Petitioner,*

v.

FEDERAL REPUBLIC OF GERMANY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## REPLY BRIEF

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## REPLY BRIEF

The issues presented in Mortimer Off Shore Services, Ltd.'s ("Mortimer") petition fully satisfy this Court's criteria for certiorari. The Second Circuit's decision misreads the Foreign Sovereign Immunities Act ("FSIA") to bar courts from entertaining suits based on foreign states' undisputed commercial activity, merely because of an intermediate state or government succession. If left to stand, it will make the Wall Street debt market shudder, due to the hundreds of billions of dollars in outstanding sovereign debt implicated by the circumstances of this case. The Second Circuit's decision interferes with the sanctity of sovereign debt contracts, permitting countries and municipalities to benefit from loan proceeds for their territories while escaping repayment obligations. It creates a split of legal authority among the circuits, *see World Holdings, LLC v. Federal Republic of Germany*, 613 F.3d 1310, 1315 (11th Cir. 2010), and abrogates this Court's longstanding rule that "a mere change of sovereignty" does not serve to extinguish public debt obligations. *See Vilas v. City of Manila*, 220 U.S. 345, 353-54 (1911). It is also incompatible with this Court's FSIA jurisprudence, which covers suits based on acts by a predecessor. *See Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

The FSIA was enacted to ensure that foreign states that engage in commercial activity are on a level playing field with other commercial actors. The Second Circuit's decision construes the FSIA's

jurisdiction provisions to create an artificial distinction between the counterparties to commercial transactions with states that underwent a succession event, and those that did not. The need to preserve the sanctity and enforceability of sovereign debt instruments that, like the bonds at issue in this case, are issued and traded by United States financial institutions and other investors is a matter of great national and international importance that demands review of the Second Circuit's decision. Indeed, suits against Respondent Federal Republic of Germany ("Germany"), hardly considered by the markets to be a serious default risk, are currently pending in district courts in the First, Second, Seventh, and Eleventh Circuits. The Court should grant certiorari to address the important statutory issues this case presents.

## I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS

The Second Circuit's decision that "automatic assumption of liability by a successor state . . . would not meet the requirements of the FSIA's commercial activity exception" conflicts with decisions of other courts of appeals and would abrogate decisions of this Court. Pet. 20-26. Its rationale is illogical and unsupportable on its face given the irrefutable commercial nature of sovereign debt.

1. Germany's attempt to downplay the conflict between the decision below and *World Holdings* fails.

Opp. 4-6. The Second Circuit's holding that "[a]ccession to liability by the rules of customary international law entails no action by the successor state," Pet. App. 30, would have required dismissal in *World Holdings* because Germany's predecessor state or government issued and sold the debt obligations in that suit in the period before World War II, and the court did not identify any post-succession commercial activity on which to predicate jurisdiction.

Germany claims that "[t]here was no question in *World Holdings* that the commercial activity exception applied . . . because Germany was the issuer of the bonds and not a third party that allegedly became liable on the bonds by state succession." Opp. 5. But guaranteeing another party's performance is no less an affirmative commercial activity than issuing bonds. Pet. 11 (quoting *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 199 F.3d 94, 99 (2d Cir. 1999); *Tonoga, Ltd. v. Ministry of Public Works & Hous.*, 135 F. Supp. 2d 350, 356 (N.D.N.Y. 2001)). In addition, Mortimer's claims are not only grounded in Germany's liability by state succession, but also in Germany's predecessor state or government's activity guaranteeing the bonds through its dissolved political subdivisions before World War II. Pet. 12, 23 n.2. Germany's purported distinction is legally meaningless and ignores Mortimer's allegations.

It is also of no moment that the Eleventh Circuit's decision addressed and rejected Germany's argument that an extant treaty, Certain Matters Arising from the Validation of German Dollar Bonds,

4 U.S.T. 885 (1953) ("1953 Treaty"), superseded the FSIA and precluded the Court from exercising jurisdiction. Opp. 4-5. The only reason that it was necessary for the court to consider this argument was because of its antecedent determination that Germany's "issuance and sale of bonds within the United States" in 1924 and 1930 constituted commercial activity. 613 F.3d at 1315.

Finally, Germany's concession in *World Holdings* "that the commercial activity exception applied" to pre-World War II commercial activity, Opp. 5, does not ameliorate the conflict between the decision below and *World Holdings*. Waiver of immunity under the FSIA can only occur where a court determines that 28 U.S.C. § 1605(a)(1)'s waiver provisions are satisfied, and the Eleventh Circuit expressly refused to make that finding. Pet. 24 (citing 613 F.3d at 1317 n.12). Germany's purported distinction evidences its tactic to take inconsistent positions in litigation, but does not cure the split between the Second Circuit's decision and *World Holdings*.

2. Germany's claim that the decision below does not conflict with this Court's decisions in *Vilas* and *Altmann* is incorrect. Germany alleges that there is no conflict with *Vilas* because that decision was decided before the FSIA was enacted. Opp. 6. The date of the FSIA's enactment is irrelevant – Germany concedes that the FSIA applies to conduct that occurred before its enactment. Opp. 6. As such, the Second Circuit's decision construes the FSIA as an effective bar to this Court's holding in *Vilas* that a

"mere change of sovereignty" does not serve to extinguish public debt obligations. 220 U.S. at 353-54.

Germany is similarly incorrect when it states that the decision below does not conflict with *Altmann*. Opp. 6. *Altmann* holds that the FSIA applies to conduct that occurred before the FSIA's enactment. *See* 541 U.S. at 697-98. There would have been no reason for the Court to answer this question if Austria was not subject to suit under the FSIA for property that was allegedly taken unlawfully by Austria's predecessor state or government. Pet. 22. Under the rule articulated by the court below – that successor states or governments are not liable for acts of their predecessors that constitute a waiver of immunity under the FSIA – Austria could have avoided suit simply by pleading that the property in question was taken by a predecessor. This fact illustrates the conflict between the decision below and *Altmann*, and emphasizes the importance of the issues presented by the Petition.

3. The brief in opposition ignores other conflicts Mortimer identified in its Petition. For instance, Germany does not contest that the decision below conflicts with the D.C. Circuit's decision in *Agudas Chasidei Chabad of United States v. Russia*, 528 F.3d 934 (D.C. Cir. 2008), in which the court exercised jurisdiction over Russia and its instrumentalities for property unlawfully taken by its predecessor, the Soviet Union. Pet. 24-25. These conflicts are sufficient to merit the Court's exercise of its certiorari jurisdiction, both by themselves and in conjunction

with the other important, recurring issues Mortimer identifies.

## II. THE PETITION PRESENTS RECURRING ISSUES OF NATIONAL IMPORTANCE

Germany's response to Mortimer's thorough explanation of the significance of the sovereign debt market tacitly acknowledges the importance of the issues raised by the Petition, including protecting the sovereign debt market, but misapplies the Court's criteria for certiorari and downplays or ignores the recurring nature of these issues.

1. Germany effectively reinforces the need to protect the rights of sovereign debt holders by acknowledging that "the Petition reads exactly like what an advocate would present to a committee of the Congress." Opp. 8. Congress did in fact protect these interests by enacting the FSIA, which was designed to place counterparties to foreign states' commercial transactions on par with other economic actors. Pet. 14-15. The decision below ignores the FSIA's plain language that "activity . . . by the foreign state" encompasses predecessor governments and states, and thereby frustrates Congress's intent. *Id.* Contrary to Germany's suggestion, Mortimer's explanation of the importance of preserving a vibrant sovereign debt market comports with this Court's criteria for certiorari, *see* Sup. Ct. R. 10, and is not an argument that the FSIA "is unwise legislation." Opp. 8. Rather, the importance of these markets speaks to Congress's

purpose in enacting the FSIA, the proper interpretation of the statute in light of that purpose, and the severe consequences of the Second Circuit's decision to construe the law otherwise. Countries and municipalities would effectively be granted the right to receive billions of dollars in loan payments for the benefit of their territories, while wholly escaping repayment as a result of even a minor change of state or government.

2. Germany's claim that the Petition does not present frequently occurring legal issues is not correct. Opp. 9. Both state succession and sovereign default are common occurrences, and the incidence of sovereign default has escalated as global economic conditions have deteriorated. Pet. 32-33. The Second Circuit's decision, which governs suits brought in the United States' largest financial forum, would allow successor states or governments to dishonor their predecessors' debts without concern for legal recourse. The debt markets on Wall Street will shudder at the concept of rendering large quantities of outstanding sovereign debt obligations unenforceable.

With respect to Germany, a country not generally considered to be a sovereign debt default risk, the Petition identifies seven pending actions in which the respondent's amenability to suit in connection with its predecessor states or governments' commercial activity was at issue. Pet. 8. Germany ignores four of these suits entirely. *Compare* Pet. 8, with Opp. 9. Germany's argument that the remaining three cases are distinguishable is flawed. *World Holdings* directly

splits with the decision below. *See supra* 2-4. *Bleier v. Bundesrepublik Deutscheland*, No. 08-CV-6254 (N.D. Ill. filed Nov. 3, 2008), concerns a different bond issue than in this case, Opp. 9, but the legal issues are indistinguishable: the Second Circuit's decision was predicated on German state or government succession, not on the series of bonds Mortimer sought to redeem. And finally, *Mortimer Off Shore Servs., Ltd. v. Federal Republic of Germany, et al.*, No. 10-1151 (D. Mass. filed Sept. 10, 2010), includes a plaintiff who was not party to this action and breach of contract claims predicated on a specific guaranty agreement that the court below did not consider.

In light of these pending suits, Germany's claim that "[t]he facts surrounding the application of the FSIA and its exceptions to the unique situation that arose in post-war Germany . . . do not . . . raise a recurring issue of federal law of national importance" is not credible. Opp. 9. Rather, these issues have already recurred, and given the enormous value of the bonds repudiated by Germany, are certain to continue to recur. Pet. 31-32.

## III. REVERSING THE DECISION BELOW WOULD CHANGE THE OUTCOME OF THE UNDERLYING ACTION

Germany's claim that Mortimer's claims would be dismissed if the Court issued the writ and reversed misrepresents the decision below. Opp. 7-8.

The Bonds at issue in this action were severally issued pursuant to specific percentages of liability by fourteen state-owned municipal banks. Pet. App. 5. All of these banks were in Germany at the time of issuance; after World War II, some of the *länder* that owned the banks were incorporated into the Federal Republic of Germany (in relevant part "West Germany"), and others incorporated into the German Democratic Republic ("East Germany"). Pet. App. 5. Thus, while there was one physical bond, there were two distinct sets of issuers: West German issuers and East German issuers.

The Second Circuit's decision that West German issuers' obligations must be validated was predicated on its construction of the 1953 Treaty and Validation Law for German Foreign Currency Bonds, Aug. 25, 1952, BGBl.I, at 553 (F.R.G.) ("Validation Law"). Pet. App. 44-47. The Second Circuit explained that the Treaty's purpose was to facilitate "the 'orderly settlement of,' debts owed by territory that became West Germany after World War II." Pet. App. 11.[1] As such, "the category of bonds at issue in this case [ ] are included in the schedule of foreign currency bonds covered by the Validation Law," Pet. App. 11, but that

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[1] *See also* 28 Dep't St. Bull. 376, 380 (Feb. 26, 1953) (explaining that the 1953 Treaty "does not apply to dollar bonds issued by public or corporate entities having their seats in that part of Germany which is under Soviet control or Polish administration. . . .").

Schedule *expressly excluded* the Bonds' non-West German issuers, Validation Law, BGBl.II, at 327, Schedule C.IV.[2]

The Second Circuit then noted that a later bilateral treaty, Second Agreement Regarding Certain Matters Arising from the Validation of German Dollar Bonds, U.S.-F.R.G., Aug. 16, 1960, 12 U.S.T. 944, "did not extend the Validation Law to the Agricultural Bonds issued in the territory that became East Germany." Pet. App. 13. Nor did the Unification Treaty, which the Second Circuit recognized expressly provided that the Validation Law would not enter force for entities located in East Germany. Pet. App. 41 ("Article 11's plain language only *excludes treaties listed in Annex I from being extended to former East German territory*.").

Given the decision below that neither the 1953 Treaty nor the Validation law applied to the East German issuers, Germany's statement that "the East Germany portion of the Bonds would have been on the same legal footing as the West German portion," Opp. 7, is untenable. On remand, Mortimer's claims would not be barred with regard to the East German

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[2] *See also* Agreement on German External Debts art. 4(2)(b), U.S.-F.R.G., Feb. 27, 1953, 4 U.S.T. 445, 448-49 (1953) (limiting the scope of the treaty to debts "owed by a person, whether as principal or otherwise, and whether as original debtor or as successor, who . . . resides in the currency area of the *Deutschemark West*").

issuers, which comprise approximately 65 percent of the Bonds' value.

## CONCLUSION

For the foregoing reasons and those set forth in the Petition, the Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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